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In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

No. 79-1862

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Jurisdictional Statement.

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Jurisdictional Statement.

Globe Newspaper Company, the appellant, appeals from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, dated February 26, 1980, holding that M.G.L. c. 278, § 16A requires exclusion of the press and the public from portions of certain criminal trials and authorizes exclusion of the press and the public from the entire trial when exclusion is deemed necessary to preserve evidence required for a just conviction.

Opinions Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, which appears in the appendix hereto, pages 25a *et seq.*, *infra*, is reported at Mass. Adv. Sh. (1980) 485, 401 N.E. 2d 360.

The decisions of the single justice of the Supreme Judicial Court for the County of Suffolk and of the trial judge of the Superior Court for the County of Norfolk are oral and unreported. Copies of portions of the transcripts of the hearings held before said courts at which the oral decisions were rendered and announced are included in the appendix hereto, pages 8a *et seq.* and 12a *et seq.*, *infra*.

Jurisdiction.

This is an appeal from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered February 26, 1980. In its decision the Court held that M.G.L. c. 278, § 16A requires a trial judge to exclude the press and the public from the trial of certain crimes when the minor victims of such crimes are testifying. The court further held that the statute authorized the trial judge, in his discretion, to order the entire trial of such crimes closed to the press and the public when closure was necessary "to preserve evidence required for a just conviction."

A Notice of Appeal to this Court from that judgment was timely filed with the clerks of the Superior Court for the County of Norfolk, the Supreme Judicial Court for the County of Suffolk and the Supreme Judicial Court for the Commonwealth of Massachusetts on May 4, 1980. See App. at 54a *et seq.*, *infra*. The appeal is being docketed in this Court within

90 days from February 26, 1980, the date of entry of the final judgment of the Supreme Judicial Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Statute Involved.

The text of M.G.L. c. 278, § 16A is as follows:

> *Exclusion of public from trial for sex offenses involving minors under age of eighteen.* At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the nonsupport of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

Questions Presented.

1. Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render M.G.L. c. 278, § 16A void as construed by the Supreme Judicial Court to require the exclusion of the press and the public from portions of certain criminal trials even over the opposition of the defendant and in the absence of a request by the prosecutor or victim for such exclusion.

2. Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render M.G.L. c. 278, § 16A void as construed by the Supreme Judicial Court to authorize the exclusion of the press and the public from the entire trial of certain criminal matters, or portions thereof, whenever the trial judge decides that exclusion is "necessary . . . to preserve evidence required for a just conviction."

Statement of the Case.

On or about April 19, 1979, the Superior Court for the County of Norfolk, Massachusetts commenced hearings with respect to pre-trial motions in the criminal case styled *Commonwealth* v. *Aladjem*, Norfolk Superior Court Criminal No. 73102-9. At that time, the trial judge caused to be placed on the courtroom door a sign which stated "Closed." All persons approaching the courtroom doors were told by courtroom personnel that they could not enter.

On April 25, 1979, prior to the commencement of that day's proceedings and the trial itself, counsel to Globe Newspaper Company (the "*Globe*") filed with the clerk three motions: (1) a motion to revoke orders concerning exclusions of the press from pretrial[1] or trial proceedings in the case (App. 5a); (2) a motion for a hearing with respect to any orders excluding the press from pretrial or trial proceedings (App. 6a); and (3) a motion to intervene for the limited purpose of asserting the right of the press to attend the pretrial and trial proceedings (App. 7a). The trial judge opened the proceedings that day by

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[1] The petition which is the subject matter of this appeal is limited to the order entered by the trial court on April 25, 1979, which excluded the public and the press from the trial itself. No pretrial issues are presented.

identifying the three motions filed by the *Globe*. Then, immediately after the prosecutor confirmed his understanding of the age and sex of the victims and the fact that rape was the crime involved, the trial judge orally issued the following two rulings:

> This court rules that the Motion to Intervene may not be filed. . . . This court further rules that, consistent with General Laws Chapter 278, Section 16A, this trial will be conducted in such a manner that the general public shall be excluded from the courtroom, including the press, and that only such persons as may have a direct interest in the case will be permitted in the courtroom. (App. 10a.)

At that point, counsel to the defendant in the case noted his exception to the court's ruling excluding the general public and the press (App. 11a). The prosecutor then stated that the ruling had not been made at the request of the Commonwealth (App. 11a). The trial judge next indicated that the pretrial proceeding scheduled for that day would continue and that the courtroom should be cleared (App. 11a).

On April 25, 1979, the same day that the order closing the trial was entered by the trial court, the *Globe* filed a petition for extraordinary relief pursuant to M.G.L. c. 211, § 3,[2] in the

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[2] Filing such a petition constitutes commencement of a new, and not an appellate, proceeding over which the Supreme Judicial Court has exclusive original jurisdiction. M.G.L. c. 211, § 3 provides:

> The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.
>
> In addition to the foregoing, the justices of the supreme judicial court shall also have a general superintendence of the administration

Supreme Judicial Court for the County of Suffolk, contesting the legality and constitutionality of the closure order entered pursuant to M.G.L. c. 278, § 16A by the trial court and the procedure pursuant to which the trial court had entered that order. The immediate relief sought by the petition was an injunction which, in effect, would have reversed the closure order and permitted members of the press to attend the criminal trial then about to commence (App. 1a-4a).

A hearing on the petition was held before a single justice of the Supreme Judicial Court for the County of Suffolk on the following day, April 26, 1979. At the hearing, the district attorney responsible for prosecuting the criminal case represented to the single justice that the prosecuting attorney had discussed the closure order with the victims and that, on behalf of the victims, the district attorney was waiving whatever rights the Commonwealth might have had under § 16A to seek to exclude the press from the trial (App. 15a-16a).

The single justice, while observing that the procedures utilized by the *Globe* in the trial court "adequately raised the question whether the *Globe* has any right to have the trial public" (App. 14a), denied the petition. He ruled orally that M.G.L. c. 278, § 16A was "mandatory in its terms" (App. 19a) and that even if not "utterly mandatory" (App. 19a), there had been no showing that the trial court had abused its discretion in closing the trial. He then ruled that the *Globe* had no

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of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the mprovement of the administration of such courts, and the securing of their proper and efficient administration. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

First Amendment right to attend the trial and had no standing to raise any Sixth Amendment contentions (App. 20a-21a). A written order denying the petition was entered later the same day (App. 22a),[3] and final judgment dismissing the petition was entered eleven days later on May 7, 1979 (App. 23a). No answer to the petition was ever filed by the defendant, appellee.

Following entry of the single justice's order of April 26, 1979 denying the petition, impanelment of the jury in the underlying criminal action, *Commonwealth* v. *Aladjem*, began and that case was tried. On May 10, 1979, Mr. Aladjem was found not guilty (App. 28a). The trial was closed to the press and public throughout its course (App. 25a).

On May 17, 1979, the *Globe* filed its notice of appeal to the Supreme Judicial Court for the Commonwealth of Massachusetts from the May 7 judgment dismissing its petition. On February 26, 1980, the Supreme Judicial Court rendered its opinion.

In its opinion, the Supreme Judicial Court held that the issues raised before the single justice were moot, but that they were "significant and troublesome, and . . . 'capable of repetition yet evading review'" (App. 26a). Thus, while dismissing the *Globe's* appeal on grounds of mootness, the Supreme

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[3] The record contains the transcript of a brief lobby conference which took place on April 30, 1979, four days later. At the conference, attended by counsel for the parties to the criminal trial and the trial judge, the prosecuting attorney said that she had spoken to the victims again and that they had told her that they had no objection to the presence of the press at the trial if the press would agree not to print their names, their photographs, where they went to school or other personal data about them. No action was taken with respect to the prosecuting attorney's comments, no examination of the victims with respect to their views thereafter was undertaken by anyone, and the trial proceeded in accordance with the trial court's earlier order of closure. As will be seen, the concerns voiced by the victims on April 30 were concerns with which § 16A was not equipped to deal.

Judicial Court deemed it appropriate to express its views on the issues the appeal raised (App. 26a).

The court did not, however, address the constitutional claims raised by the *Globe*. Although it acknowledged that such issues had been raised, it decided to await this Court's decision in *Richmond Newspapers, Inc.* v. *Virginia*, 46 U.S.L.W. 3178 (No. 79-243) (appeal filed August 14, 1979, argued February 19, 1980). It further reasoned that it could avoid the constitutional questions because, by construing the statute to resolve ambiguities, it would reach a conclusion "which approximates the results urged . . . by the *Globe* on constitutional grounds" (App. 34a). Its conclusion did not, however, achieve that result.

In its construction of the statute, the Supreme Judicial Court discussed both the important purposes served by public trials and the interests it found were served by § 16A, *i.e.*, sparing victims the embarrassment of public testimony (App. 36a-37a), and protecting the state's interest in "sound and orderly administration of justice" (App. 40a). Analyzing the language of the statute in light of those interests, the court construed § 16A to require exclusion of the press and public from trials of certain crimes while the minor victims of those crimes were testifying (App. 42a). If further construed the statute as granting to the trial court discretion to exclude the press and the public from the entire trial of such crimes, or additional portions thereof, if exclusion was "necessary . . . to preserve evidence required for a just conviction" (App. 44a). A further discussion of the decision of the Supreme Judicial Court is incorporated below.

Raising the Federal Question.

At the earliest possible stage in the relevant proceedings, the *Globe* raised the claim that M.G.L. c. 278, § 16A violated the

First and Sixth Amendments to the Constitution of the United States. In the petition filed by the *Globe* with the Supreme Judicial Court for Suffolk County on the day of the trial court's closure order — the petition which commenced the action on which this appeal is based — the *Globe* asserted that the order excluding the press from the trial was in "violation of the First Amendment to the Constitution of the United States" (¶ 9) (App. 3a) and "in violation of the Sixth Amendment to the Constitution" (¶ 10) (App. 3a).

These federal constitutional claims were reiterated by the *Globe* before the Supreme Judicial Court for the Commonwealth of Massachusetts. That court construed the statute to permit, and in fact to require closure, in certain circumstances, but never reached the federal constitutional questions. Instead, the Supreme Judicial Court said that it preferred to await this Court's decision in *Richmond Newspapers, Inc.* v. *Virginia*, 46 U.S.L.W. 3178 (No. 79-243) (appeal filed August 14, 1979, argued February 19, 1980) (App. 33a). The Supreme Judicial Court's narrowing construction of the statute did not, however, obviate the *Globe's* constitutional claims: the statute, as construed, still requires exclusion of the press and the public from portions of certain criminal trials and permits their exclusion from the entire trial in the court's discretion.

By upholding the statute, as construed, despite the specific challenges made by the *Globe* on federal constitutional grounds, the court in effect denied those federal claims. The failure of the Supreme Judicial Court to pass on the constitutional questions pressed by the *Globe* thus has no adverse impact on this Court's jurisdiction, as "the necessary effect of the judgment [was] to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would [have] require[d] a judgment different from one resting upon some ground of local or general law." *Chicago, Burling-*

ton and Quincy Rwy Co. v. *Drainage Commissioners*, 200 U.S. 561, 580 (1906). The failure of the Supreme Judicial Court to recognize the claimed right "necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied." *Id.* at 581.[4] Because the press may continue to be excluded from some criminal trials, or portions thereof, under the statute as construed, the effect of the Supreme Judicial Court's decision thus was to deny the *Globe's* constitutional claims. It is review of that denial which is here sought.

The Questions are Substantial.

The questions presented by this appeal require the attention of this Court, lest rights guaranteed by the First, Sixth and Fourteenth Amendments to the Constitution be compromised by the failure to draw clear boundaries around the principles of law announced in *Gannett Co., Inc.* v. *De Pasquale*, 443 U.S. 368 (1979).

The issues which this appeal presents are novel and have not been addressed before by this Court. In *Gannett*, the defendant, the prosecutor and the judge all agreed to close certain pretrial hearings concerning the suppression of evidence, and this Court's decision in that case did not uphold a mandatory statutory provision. Instead, given the agreement of the parties that the proceeding should be closed and the court's discretionary power to effectuate that agreement, the issue in *Gannett* was "whether the constitution [nevertheless] *requires* that a pretrial proceeding . . . be *opened* to the public," *id.* at

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[4] *Accord, Lawrence* v. *State Tax Commission of Mississippi*, 286 U.S. 276, 282 (1932); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921). *See generally Kingley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684 (1959).

385 (emphasis supplied and in original). That is an entirely different question than the one presented here: whether a state can pass a non-discretionary statute requiring that a trial be *closed*, regardless of the defendant's desires, the prosecutor's desires, or the public's desires.

Moreover, there is a distinction between closure of pretrial proceedings in which the admissibility of certain evidence will be determined and closure of the trial itself, where only admissible evidence will be presented. *See Gannett, id.* at 394-96 (Burger, C.J., concurring). Thus, the considerations to be weighed are entirely different. As Justice Powell stated in *Gannett, id.* at 400, the question to be considered in determining whether a particular pretrial proceeding should be closed is "whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and *free to report prejudicial evidence that will not be presented to the jury.*" (Emphasis added.) The concern that such inadmissible evidence might reach the eyes and ears of the jury is entirely irrelevant once the trial has begun; at that point, all the testimony and evidence, including the testimony of the prosecutrix, whether a minor or not, is presented expressly for consideration by the jury.

Furthermore, this appeal raises issues not raised by the pending case of *Richmond Newspapers, Inc.* v. *Virginia*, 46 U.S.L.W. 3178 (No. 79-243) (appeal filed August 14, 1979, argued February 19, 1980). The Virginia statute there at issue provides the trial judge with discretion to determine whether a trial should be closed, "provided that the right of the accused to a public trial shall not be violated." Va. Code § 19.2-266. A resolution of the issues in the *Richmond Newspapers* case thus will not resolve the very different questions presented here, for there is no mandatory provision in the Virginia statute, and in fact its very language recognizes the countervailing interest in public trials.

Even with respect to the discretionary power given to the Massachusetts trial courts by the Supreme Judicial Court's construction of M.G.L. c. 278, § 16A, the issues presented by the *Richmond Newspapers* case are distinguishable. As construed, the standard for determining the propriety of closure under § 16A at times other than when the victim is testifying is whether closure is necessary "to preserve evidence required for a just conviction" (App. 44a). The wishes of the defendant, as well as of the public, the prosecutor and the press, can be disregarded by the trial judge in making this determination (App. 44a). Such an amorphous and unpredictable standard for decision-making presents different, and more serious, constitutional problems than those presented by the Virginia statute at issue in *Richmond Newspapers*.

I. The Case Is Not Moot.

The Supreme Judicial Court held that, because the relevant criminal trial had ended prior to the time its opinion was announced, this case was moot. As noted above, the court nevertheless viewed the issues presented as "significant and troublesome, and . . . 'capable of repetition yet evading review'" (App. 26a). Accordingly, the court deemed it appropriate to express its views on those issues.

For purposes of this Court's jurisdiction, the simple fact that the specific criminal trial to which access was sought has ended does not render the case automatically moot, *see Super Tire Engineering Company* v. *McCorkle*, 416 U.S. 115 (1974),[5] for

[5] It is well-settled that, for purposes of this Court's jurisdiction, the question of mootness is itself a federal question. *See, e.g., DeFunis* v. *Odegard*, 416 U.S. 312, 316 (1974); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304 (1964). Thus, the Supreme Judicial Court's mootness conclusion is not an adequate state ground for its decision which deprives this Court of appellate jurisdiction.

this appeal does indeed involve a dispute "capable of repetition, yet evading review." *Southern Pacific Terminal* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). To avoid mootness on the grounds that the dispute is one "capable of repetition yet evading review," two conditions must be satisfied: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Gannett Co., Inc.* v. *DePasquale*, 443 U.S. 368, 377 (1979), *quoting Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (*per curiam*). Those two conditions are clearly satisfied in the instant case.

It is obvious that if this Court declines to resolve the constitutional issues presented by this appeal, the same party may again be subject to orders closing criminal trials under the authority of § 16A. The *Globe*, a newspaper of general circulation in Massachusetts and elsewhere, will again and again find the courtroom door closed, whether as the result of a mandatory order or as the result of a trial court's exercise of discretion under the statute. Despite the Supreme Judicial Court's pronouncements about mootness, it is clear that its construction of § 16A is binding upon the trial courts unless and until the statute's constitutional defects are declared and eliminated. *See generally Commonwealth* v. *Williams*, Mass. Adv. Sh. (1980) 515, 517 n.2.

Every time the *Globe* faces the prospect of being denied access to a criminal trial, it may pursue the steps it has followed in this case: seeking a hearing at the trial court level, petitioning for extraordinary relief under M.G.L. c. 211, § 3, seeking review by the Supreme Judicial Court and then appellate review by this Court. Even with the expeditious pursuit of this appeal, it has been over a year since the proceedings in the underlying trial commenced. It is impossible to imagine that a trial of any of the types of crimes covered by § 16A would

take a year to complete. Thus, the *Globe* could under no foreseeable circumstances obtain review by this Court of an order entered under § 16A prior to the termination of trial. *Compare, e.g., Roe* v. *Wade*, 410 U.S. 113 (1973).

For these reasons, the *Globe* urges that this appeal is not moot and that this Court should entertain review on the merits of the issues the appeal presents.

II. M.G.L. c. 278, § 16A as Construed by the Supreme Judicial Court Violates the First Amendment to the Constitution as Applied to the States through the Fourteenth Amendment.

In the decision below, the Supreme Judicial Court recognized the fact that "[p]ublic trials protect against systematic use of the courts as instruments of political and religious persecution," (App. 34a) and that publicity "prevents abuses of a single judge's power" (App. 34a), and may deter witness perjury (App. 34a). It reasoned that the practice of open criminal trials "improves the quality of justice done in the courts and binds the courts more closely to the society they serve" (App. 35a). Nevertheless, the court read M.G.L. c. 278, § 16A as a statute intended to protect the minor witnesses who were to testify in certain criminal trials in order to preserve the testimony of such witnesses. The court therefore held that when such witnesses were testifying the trial judge was required to close the trial to the press and public and that he had broad discretion to close all other portions of the trial. Both the mandatory and the discretionary portions of § 16A, as construed, however, infringe the rights guaranteed by the First and Fourteenth Amendments to the press and the public to attend criminal trials.

A. *The First Amendment to the Constitution Guarantees a Right to Attend Criminal Trials.*

It is true, of course, that the First Amendment does not speak *in haec verba* of a right afforded the press or public to attend the trial of criminal cases. That fact resolves nothing, for the First Amendment comprehends a host of activities which, although not explicitly stated, are undeniably an essential ingredient of the broad freedom of "speech" and of the "press" the Amendment so firmly guards. Included are the right to receive literature, *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943); the right to hear, *Thomas* v. *Collins*, 323 U.S. 516, 534 (1945); the right "to inquire, to study and to evaluate," *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957); *see Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974); the right to "receive information and ideas," *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972); the right to receive advertising messages, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Bates* v. *State Bar of Arizona*, 434 U.S. 881 (1977); and, indeed, the right to receive all "ideas regardless of their social worth," *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). From those and a host of similar cases emerges the inescapable conclusion that the First Amendment is designed to protect, not a set of discrete and unrelated activities, but a process by which information is gathered, digested and disseminated so that informed evaluation and reasoning is possible by all.

While the First Amendment protects the process of acquiring, digesting and disseminating material concerning "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period," *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940), "[a] major purpose of that Amendment [is] to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384

U.S. 214, 218 (1966). And there can be no doubt that a criminal trial is a governmental affair of highest moment: the indictment charges that the laws of the Commonwealth have been violated; at trial the prosecutorial power of the Commonwealth marshalls the government's case against the defendant; the trial itself is a test beyond reasonable doubt of the truth of the charges brought by the government against the accused; and, if the verdict be guilty, the sentence imposed often results in a severe curtailment of personal liberty and a commitment of the defendant to virtually absolute governmental control.[6]

Beyond that, the public interest in criminal proceedings often reaches far beyond the verdict of guilty or innocent in a specific trial. In large measure, it is in the criminal courtrooms of this nation that the substantive content of the criminal law applicable throughout the land is shaped and defined. On foundations laid in those courtrooms have been built principles governing such significant and far-reaching questions as whether evidence obtained in violation of the Fourth Amendment shall be suppressed, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); whether and to what extent the Constitution guarantees a right to counsel at trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); what factors are necessary for a fair identification of the accused, *Stovall* v. *Denno*, 388 U.S. 293 (1967); whether the Constitution requires that counsel be present at identification of the ac-

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[6] For that reason, this Court has said that a prosecutor is the:

> representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as is its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. *United States*, 295 U.S. 78, 88 (1935).

cused, *compare Gilbert* v. *California*, 388 U.S. 263 (1967) with *Kirby* v. *Illinois*, 406 U.S. 682 (1972); under what circumstances confessions shall be deemed voluntary and admissible at trial, *Jackson* v. *Denno*, 378 U.S. 368 (1964); under what conditions a plea of guilty may be accepted, *Boykin* v. *Alabama*, 395 U.S. 238 (1969); and what factors compatible with "evolving standards of decency" govern sentencing under the Eighth Amendment including the ultimate question of whether death ever may be exacted as a penalty, *compare Furman* v. *Georgia*, 408 U.S. 238 (1972) *with Commonwealth* v. *O'Neal*, 369 Mass. 242 (1975). No executive officer, no administrative board, no legislative committee and no panel of experts resolved those questions. The courts did. And the process by which they did so began, and was shaped substantially, in the criminal trial itself.

In sum, the courts, no less than the other two branches of government, and perhaps to a greater degree, have both enormous power and enormous responsibility with respect to shaping the very fabric of our society. And though of undeniable importance with respect to all three branches of government, the interests protected by the First Amendment are of particular importance as applied to the workings of the courts. The courts in deciding issues of criminal law, as in deciding constitutional issues generally, often must reach decisions as counter-majoritarian institutions charged with the responsibility of enforcing the Constitution even against the majority will. Thus, the continuing power of the courts to say what the law is — and to do so effectively — depends on a popular understanding both of the function the judiciary serves and the decisions it makes. A. Bickel, *The Least Dangerous Branch* 16-17 (1962). But unlike the other two branches of government, courts do not have vast public-relations staffs at their disposal. For sound institutional reasons, judges, unlike legislators and executives, simply cannot call press conferences

to explain and answer questions about decisions they have made. A popular understanding and support of the courts as an institution, and of the function they serve, thus necessarily depends on the ability of the press and public to observe them in action.

Given the importance of judicial proceedings to the public at large, there just can be no doubt that "the operations of the courts . . . are matters of utmost public concern." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978). Recognition of that fundamental point is explicit in decisions of this Court — decisions which have consistently affirmed the principle that judicial proceedings should be conducted in courtrooms open to the public and the press. The point has been made a number of ways,[7] all of which can be summarized concisely by the proposition that information about judicial proceedings undeniably "lies near the core of the First Amendment." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838 (1978). That being the case, acquisition of information about the operation of the courts cannot simply be a matter of governmental largesse. To conclude otherwise would be simply to stand on its head the proposition that in "our type of government . . . the citizenry is the final judge of the proper

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[7] "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," *In Re Oliver*, 333 U.S. 257, 270 (1948); "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public . . . ." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975); "[I]nformation about trials . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism," *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966); "It is of vast importance to the public that the proceedings of courts of justice should be universally known," *Cowley* v. *Pulsifer*, 137 Mass. 392 (1884); "[W]ith respect to the open conduct of judicial proceedings . . . . there is a 'general principle of publicity,'" *Ottaway Newspapers, Inc.* v. *Appeals Court*, Mass. Adv. Sh. (1977) 973, 980.

conduct of public business." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975). *See generally* Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv. L. Rev. 1899, 1904-1906 (1978).[8]

Recognition of the First Amendment as the one provision of our national charter designed to safeguard the informing process, recognition of the fact that the process exists for the purpose of allowing citizens to review in intelligent fashion the conduct of important governmental affairs and recognition of the fact that a criminal trial is a governmental affair as important as any all lead to the conclusion that attendance at a criminal trial is a right which the First Amendment must firmly guard.

The decision of this Court in *Gannett Co., Inc.* v. *De Pasquale*, 443 U.S. 368 (1979), is not to the contrary. Indeed, to the extent that this Court focused on the issue, its decision gives added strength to appellant's assertion that the First Amendment does limit governmental power to close a criminal trial. As noted above, *Gannett* was a case concerning a clos-

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[8] As James Madison put it in his oft-quoted letter:

> A popular Government without popular information or the means of acquiring it is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Government must arm themselves with the power which knowledge gives.

Letter from Madison to W. T. Barry (Aug. 4, 1822), reprinted in 9 *Writings of James Madison*, at 103 (G. Hunt ed. 1910). Thus, any law which restricts information about the processes of government — government by legislation, executive action or judicial decision — suppresses more than particular words. Rather, such a law disables the citizenry from obtaining information necessary to the discharge of its political responsibility in a republican government. *See Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975). *See generally* A. Meiklejohn, *Free Speech and its Relation to Self Government* (1948).

ure order which — at the request of the defendant, with the assent of the prosecutor and without contemporaneous objection by the press, *id.* at 375 — had excluded the public and the press from a pretrial hearing on a motion to suppress certain physical evidence and confessions allegedly obtained improperly. The issue decided by this Court in *Gannett* was whether the Sixth Amendment guarantee of a public trial implied, in the context of pretrial proceedings, "any correlative right in members of the public to insist upon a public trial." *Id.* at 381. This Court decided that it did not.

While narrowly holding that, at least in the case of pretrial proceedings, the Sixth Amendment to the Constitution confers on the public no independent right of attendance, *Gannett* bolsters the conclusion earlier stated that the First Amendment does impose a substantial brake on the power of the state to exclude the public from a trial itself. The express language of the majority opinion, the concurring opinion of Justice Powell and the dissenting opinion, all indicate the serious First Amendment concerns presented even by closure of pretrial proceedings. Beyond that, the repeated references in the majority, concurring and dissenting opinions to the significant role played by the policy of open trials in our overall scheme of self-government warrants, indeed compels, the conclusion that the First Amendment safeguards the right of public attendance at the trial of criminal cases.

B. *As Construed to Require Closure of Portions of All Trials of Certain Crimes, M.G.L. c. 278, § 16A is Unconstitutional Under the First Amendment.*

Recognition of the principle that the First Amendment preserves and protects the right of the public and the press to attend the conduct of criminal trials does not mean that no restriction on the open conduct of judicial proceedings ever is permissible. It does mean, however, that both statutes and ju-

dicial orders closing the trial of criminal cases must comport with constitutional principles.[9]

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[9] In order to place the argument which follows in its proper context, it is important to discard at once the notion that any easy solutions are available by characterizing appellant's efforts as efforts to obtain "access" to the trial-court proceedings. Even if characterized as an effort to obtain "access" rather than simply as an effort to prevent the government from censoring otherwise available information because of its content, *compare, e.g., Minarcini* v. *Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976); *Right to Read Defense Committee* v. *School Committee*, 454 F. Supp. 703 (D. Mass. 1978), that characterization solves nothing. First of all, unlike the situation presented in *Pell* v. *Procunier*, 417 U.S. 817 (1974), *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974) or *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978), all of which dealt with press access to prisons and jails, appellant is not here seeking access to an historically unavailable source of information. Indeed, every opinion issued in the *Gannett* case, as well as several opinions of this Court earlier discussed, have taken extensive and detailed account of the rich history of public criminal proceedings which has obtained in this country and in England since abolition of the Star Chamber. The historical background of the public trial at common law, considered in light of the command of the First Amendment, is important not because it is hoary and revered judicial lore but because it establishes the fundamental heritage of the open courtroom. If "access" is the proper characterization of what appellant seeks, it is access to something historically accessible. Beyond that, the prior "access" cases of *Pell*, *Saxbe* and *Houchins*, in a very real sense, simply raise and do not answer the question posed by this case. In deciding in those cases that the press had no greater right of access to jails than did the general public and in then concluding that security and other weighty interests necessarily mandated exclusion of free and unlimited public access to penal institutions, this Court purported to, and did, deal simply with the compelling governmental interest for exclusion that those cases presented. It did not intend to, nor did it, purport to say that the government can exclude the general public from any place, any time and, once it has done so, that press claims for access necessarily disappear. Finally, and of paramount importance, the reason for denial of access, and not the simple fact that "access" was sought, has been dispositive of every First Amendment "access" case this Court has considered. Indeed, where it has found that access was denied because of a fear of what the individual seeking access would say if access were permitted, it has viewed that denial as a prior restraint, thus applying to it the most exacting scrutiny our law has ever known. *E.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975); *Healy* v. *James*, 408 U.S. 169 (1972); *see Organization for a Better Austin* v. *Keefe*, 402 U.S. 415

Axiomatic by now is the proposition that "[b]road prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). Phrased another way, "a governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964). *Accord, Village of Schaumburg* v. *Citizens for a Better Environment*, 48 U.S.L.W. 4162, 4166 (U.S. February 20, 1980) (No. 78-1335). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

In order to determine whether a statutory enactment sweeps more broadly than is necessary for achievement of the end sought, it is, of course, necessary to focus with some precision on the interests which the statute seeks to advance. In order to withstand the "exacting scrutiny" mandated by the First Amendment, *e.g.*, *First National Bank* v. *Bellotti*, 435 U.S. 765, 786 (1978), the interest in question must be one which is "compelling." *e.g.*, *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960). Beyond that, "the burden is on the [state] to show the existence of such an interest." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976). Finally, it is not sufficient for the state simply to vocalize the interest in question. The existence and intensity of that interest are to be determined by this Court's own view of the impact of the statute on the articulated interest, *Landmark Communication, Inc.* v. *Virginia*, 435 U.S. 829, 841 (1978), and on the comprehension with which the statutory provisions have been

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(1971); *Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968). The "access" label, in short, resolves nothing.

drafted in order to achieve it. *E.g.*, *First National Bank* v. *Bellotti*, 435 U.S. 765, 787-88 (1978); *see Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214-15 (1975).

An examination of the interests purportedly served by § 16A quickly reveals that none saves the statute from constitutional infirmity. The Supreme Judicial Court identified essentially three related interests underlying that portion of § 16A which requires mandatory closure. The first is the interest in sparing juveniles the "embarrassment, humiliation and demoralization" (App. 36a-37a) of testifying in an open courtroom. That interest simply is not precise or focused enough to qualify as the "compelling" interest which must be present in order to justify abridgement of First-Amendment freedoms. *See Tinker* v. *DesMoines School District*, 393 U.S. 503, 508 (1969). *See generally Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

In the first place, given the language of § 16A, given the Massachusetts' court's interpretations of that statute and given the constitutional requirements of the Sixth Amendment to the Constitution of the United States, it is clear that in virtually every trial comprehended by § 16A the testimony of the complaining witness will take place before a previously unknown judge, fourteen to sixteen unknown jurors, an unknown stenographer, three or four unknown court officers, a district attorney, his or her assistants, defense counsel, his or her assistants, an unknown number of unknown witnesses for the prosecution and defense, the defendant/alleged perpetrator, and the defendant's friends, family or relatives.[10] As is evident, the group so composed often will be a sizable one. Given that fact and given the assumption that relating details of de-

[10] *See Commonwealth* v. *Marshall*, 356 Mass. 432 (1969) (§ 16A does not prohibit the defendant from having his family and friends present at his trial).

grading experiences may be difficult even in the privacy of one's own home to one's closest relatives, the quantum of embarrassment necessarily added by the presence in the courtroom of the press must remain a matter of conjecture and thus inadequate support for the infringement of First Amendment rights.

Secondly, § 16A is not triggered by the request of a victim — child or adult — for a closed hearing; in fact, § 16A requires a closed hearing even if the victim either is indifferent to, or desires, an open hearing. Surely, the desire to prevent embarrassment of the unembarrassed cannot give rise to compelling state interest if, indeed, it gives rise to any state interest at all. In any event, a statute which protects even those who would eschew its protection and does so at the expense of the First Amendment rights of others is clearly overboard. *First National Bank* v. *Bellotti*, 435 U.S. 765, 794-95 (1978).

Third, and finally, the statute is not limited in its reach to those few cases which are specifically found to be highly likely to engender the relevant adverse effect. Clearly, for example, a seventeen-year-old recipient of materials "harmful to minors," as defined in M.G.L. c. 272, § 31 and applied in M.G.L. c. 272, § 28 will not be subject to pressures at all similar to those faced by a seven-year-old victim of rape. Similarly, a teenage victim of indecent exposure would not uniformly need the stringent exclusionary rule effected by § 16A in order to ensure his or her candid and unembarrassed testimony.[11]

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[11] The examples highlight the extremely broad range of crimes § 16A is intended to cover. Although rape, incest and non-support of an illegitimate child are specific crimes, "carnal abuse" and "other crime[s] involving sex" are terms of extraordinary scope. A multitude of misdemeanor and felony crimes fall within the reach of § 16A, *e.g.*, polygamy (M.G.L. c. 272, § 15); lascivious cohabitation (M.G.L. c. 272, § 16); abortion (M.G.L. c. 272, § 19 *et seq.*); distribution of "matters harmful to minors" (M.G.L. c. 272, § 28); dissemination or possession of obscene matter (M.G.L. c. 272, § 29); annoying persons of the opposite sex (M.G.L. c. 272, § 53); or indecent exposure (M.G.L. c. 272, § 53).

Such variables as age, the substance of testimony anticipated or the reaction of the witness to the requirement that testimony be given are not afforded any consideration in the mandatory application of § 16A. That statute thus is not sufficiently tailored to its arguably narrow purpose to survive First Amendment scrutiny. *Village of Schaumburg* v. *Citizens for a Better Environment*, 48 U.S.L.W. 4162, 4166 (U.S. February 20, 1980) (No. 78-1355).

A second interest which the Supreme Judicial Court found underlying § 16A was the general paternal protection of minors afforded by the state to prevent stigmatization of those minors. As stated by the court, this interest was served not only by § 16A, but also by a group of other statutes "designed to protect the identity of minors who are subjects of litigation" (App. 37a, n.10). The court then cited several Massachusetts statutes as examples: M.G.L. c. 119, § 60A, which prohibits public inspection of juvenile court records; c. 119, § 65, which excludes the public from court sessions involving juveniles charged with crimes; c. 119, § 60, which limits collateral uses of a delinquency adjudication; c. 210, § 5C, which requires the records of adoption proceeding to be segregated; and c. 276, § 100B, which provides for the sealing of juvenile probation and court records after three years of final entry.

Paternalistic state designs, of course, do not automatically sweep from their path all countervailing considerations. *E.g.*, *In re Winship*, 397 U.S. 358 (1970); *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Butler* v. *Michigan*, 352 U.S. 380 (1957). Beyond that, the foregoing statutes are designed in essence to limit the effects of the state's exercise of its penal authority when juveniles are charged with crimes.[12] But the "stigma" which a ju-

[12] M.G.L. c. 210, § 5C, which preserves the privacy of adoption records, is clearly not intended to prevent stigma. *No one* is permitted to inspect these records, not even the adopted child or the adoptive parents, without judicial permission. It seems evident that the legislature intended the statute to assist

venile criminal may suffer as a *result* of state action is not analogous to the "stigma" which a victim may suffer as the result of individual criminal activity of some third person acting beyond the control of the state. In the first case, stigma attaches because of state action which brands a juvenile with the potentially indelible mark of criminality. Given the age of the child, the state may have a strong interest in insuring that that potential is not fulfilled. In the second case, however, state action in the form of a criminal trial serves to remove whatever stigma might otherwise attach. By seeking to prove beyond a reasonable doubt that the defendant was guilty of criminal behavior, the state seeks simultaneously to show that the victim was the innocent target of unlawful aggression. The state interest in conducting that purifying process in secret is much to be doubted.

Moreover, if prevention of stigma is the interest the statute is designed to serve, it inevitably must fail to do so. On the one hand, if a minor is, or feels, stigmatized as the result of being the victim of a crime, it is the occurrence of the crime which engenders that perception or feeling. Closing portions of the trial thus comes too late to prevent either untoward result. On the other hand, if publicity is thought to exacerbate existing stigma, then the only solution is to prevent all publicity by closing portions of all such trials and prohibiting the identification of the prosecuting witnesses. That, however, § 16A does not — indeed, could not — do. Thus, the statute is flawed by underinclusiveness as well as overbreadth. When First Amendment rights are at stake, a statute's failure to accomplish its stated purpose makes that purpose an insufficient basis for denying those rights. *Smith* v. *Daily Mail Pub-*

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in a different purpose, *i.e.*, creation of a new legal relationship between child and adoptive parent which could not be later questioned by anyone, including the child or the parents who were the subjects of the adoption decree. *See* M.G.L. c. 210, §§ 6, 7, 8.

lishing Co., 443 U.S. 97, 104-05 (1979); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214-15 (1975).[13]

Finally, there is nothing in this record or in any legislative findings to support in any way the proposition that the end of preventing stigma could not be achieved through measures more precisely tailored — measures, for example, such as vigorous governmental support for rape counseling units or programs of public education designed to remove the totally unwarranted stigma society sometimes attaches to the victim of a sexual assault. Because § 16A is not sufficiently tailored to serve the protective goals and because it will fail to achieve those goals, it cannot withstand First Amendment scrutiny. *See generally Village of Schaumburg* v. *Citizens for a Better Environment*, 48 U.S.L.W. 4162, 4266-67 (U.S. February 20, 1980) (No. 78-1355); *First National Bank* v. *Bellotti*, 435 U.S. 765, 789-90 (1978).

The third interest purportedly served by § 16A is "the State's interest in sound and orderly administration of justice," specifically an interest in obtaining "just convictions" (App. 40a). Again, the basis for asserting that that interest will be served by the statute is entirely speculative and thus not a satisfactorily "compelling" interest to justify infringement of First-Amendment rights. *See, e.g., Tinker* v. *DesMoines School District*, 393 U.S. 503, 508 (1969). The Supreme Judicial Court's entire analysis of how § 16A will serve this interest is phrased, as it must be, in speculative terms. For example, the court reasoned that the possibility of testifying in public "might" lead a young woman to choose not to cooperate with the prosecution and "[s]he *might* be deterred from coming forward at all" (App. 41a). (Emphasis added.) More-

[13] The underinclusive nature of § 16A is underscored by the fact that, as construed, the statute would not have met the *only* concerns over press attendance at trial voiced by the victims in the case at hand. *See* n.3, *supra*.

over, the court said that "the knowledge that those few extra persons [in the courtroom] were reporters who *might* publish her testimony . . . would *probably* increase . . . her sense of exposure . . .." (App. 43a.) (Emphasis added.)

It is, moreover, a contradiction in terms to state that closing a trial will secure a "just" conviction when one of the main purposes for having public trials is prevention of overzealous prosecution or biased judgments. As the Supreme Judicial Court, itself, expressly acknowledged, "[p]ublic trials protect against systematic use of the courts as instruments of political and religious persecutions" (App. 34a), and "publicity prevents abuses of a single judge's power" (App. 34a). *See also, In re Oliver*, 333 U.S. 257, 266-70 (1948). In fact, the court further recognized that "[o]pen trials may also induce members of the public to come forward with new testimony or other evidence" (App. 35a). The court marshalled no persuasive and concrete considerations to show how closure will do more to secure a "just" conviction than it will do to damage the integrity of the judicial process and thus the justice in which that process results.

In light of the foregoing, none of the interests which § 16A is asserted to serve justifies mandatory exclusion of the press and public from the testimony of all minor victims during trials of all crimes covered by § 16A. Where First Amendment rights are involved, one simply cannot substitute at will the meataxe for the scalpel. Section 16A does just that, however, and thus is unconstitutional.

C. *As Construed by the Supreme Judicial Court to Allow Discretionary Closure of An Entire Criminal Trial, M.G.L. c. 278, § 16A Violates the First Amendment to the Constitution.*

After holding that § 16A mandates the exclusion of the press and the public from portions of certain criminal trials, the

Supreme Judicial Court further held that "the decision to close any part of the trial other than the victim's testimony or to close the entire trial is a matter within the judge's sound discretion" (App. 43a). As construed by the court, however, the standard set by § 16A for exercise of that discretion was whether closure was "necessary to serve the statutory purpose; i.e., to preserve evidence required for a just conviction" (App. 44a). That standard simply cannot withstand constitutional scrutiny, for it is so broad and vague that it would countenance a virtually limitless range of reasons for closing trials.

The example provided by the Supreme Judicial Court, *i.e.*, evidence of fresh complaint (App. 44a),[14] illustrates the problem. Evidence as to whether a complaint of rape was made immediately will be introduced either by the victim or by some third party. If the court may close a trial in order that a third party[15] may testify simply as to the timing of a victim's complaint, it may do so presumably on the assumption either that the victim will not testify if a non-victim does so publicly or that the non-victim has some reason not to give the fresh-complaint testimony in public. A logical extension of that reasoning, however, would mean that any time a non-victim will not testify publicly or a victim will not testify at all if the non-victim does so publicly, a trial can be ordered closed. With such an open-ended standard, a trial could be closed for the most insignificant reasons in almost any case.

Furthermore, as discussed above, both the history of public trials and pure logic run counter to the notion that closing a

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[14] Under Massachusetts law, evidence of "fresh complaint," *i.e.*, evidence that the victim's complaint was made immediately after the crime, is admissible at trial as an exception to the hearsay rule. *E.g.*, *Commonwealth* v. *Gangi*, 243 Mass. 341, 344 (1923).

[15] If evidence of fresh complaint is offered through the testimony of the victim, of course, the press and public would be excluded from the trial under the Supreme Judicial Court's construction of the mandatory sweep of § 16A.

trial will secure a "just" conviction, for obtaining just convictions and acquittals is one of the primary purposes for conducting trials open to public view. The standard for closure articulated by the Supreme Judicial Court thus is internally inconsistent and does not sufficiently confine a trial court's discretion with respect to closure of a criminal trial.

As observed earlier, the First Amendment demands "[p]recision of regulation," *NAACP* v. *Button*, 371 U.S. 415, 438 (1963), and will not tolerate broad and formless discretionary standards. *Village of Schaumburg* v. *Citizens for a Better Environment*, 48 U.S.L.W. 4162, 4166 (U.S. February 20, 1980) (No. 78-1336); *Cox* v. *Louisiana*, 379 U.S. 536, 557-58 (1965); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940); *Lovell* v. *Griffin*, 303 U.S. 444, 450-53 (1938). The discretionary standard provided by the Supreme Judicial Court's construction of § 16A, however, is so vague and shadowy that it is in reality a room without walls. Without a more precise limitation of its scope, § 16A as construed to permit closure of an entire trial is unconstitutional.

III. M.G.L. c. 278, § 16A Violates Appellant's Rights Under the Sixth Amendment to the Constitution of the United States.

In addition to the First Amendment principles just canvassed, the Sixth Amendment to the Constitution of the United States, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." also conferred on appellant a right to attend the trial of Albert Aladjem, a right that both § 16A and the closure order violated.

Little can be said about the Sixth Amendment issue here posed which was not said in one or more of the opinions in

Gannett Co., Inc. v. *De Pasquale*, 443 U.S. 368 (1979). The appropriate question, therefore, concerns the impact of that decision on this case. To begin with, the Sixth Amendment issue with which the majority dealt in *Gannett* was a narrow one, despite the sometimes broad language of its opinion. In the Court's words:

> There is no question that the Sixth Amendment permits and even presumes open trials as a norm. But the issue here is whether the Constitution *requires* that a pretrial proceeding such as this one be opened to the public, even though the participants in the litigation agree that it should be closed to protect the defendant's right to a fair trial. The history [of the Sixth Amendment demonstrates that the Amendment was not] intended to create a constitutional right in strangers to attend a pretrial proceeding, . . . [but] was to confer upon the accused an explicit right to demand a public trial. *Id.* at 385-86 (emphasis in original).

The narrow holding of *Gannett* thus is that the public may not raise the Sixth Amendment as a constitutional bar to an order closing a pretrial hearing where an open hearing poses a "reasonable probability of prejudice" to a defendant's right to a fair trial and where all participants in the hearing agree on closure. *Id.* at 375, 393-94.

So to state this Court's holding in *Gannett* is to distinguish it at once from the present case. Here we are dealing with a trial, not with a pretrial proceeding. Here the prosecutor did not request closure, and here the defendant specifically objected to the closure order. Whatever might be said of a "stranger's" standing to assert a Sixth Amendment right to a public trial when the criminal defendant abjures that Amendment's pro-

tections, it seems clear that that standing exists when the defendant himself seeks to assert at a trial the rights the Amendment provides.

This Court, as well as the Supreme Judicial Court, frequently have recognized the interests of a criminal defendant in having a public trial. The integrity of the process is protected by preventing the abuses which secret trials can engender: corrupt or overzealous use of judicial and prosecutorial power; *Gannett Co., Inc.* v. *DePasquale*, 443 U.S. 368, 380-81 (1979); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975); *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966); *In re Oliver*, 333 U.S. 257, 270 (1948). Furthermore, "[o]penness in court proceedings may . . . induce unknown witnesses to come forward with relevant testimony," *Gannett Co., Inc.* v. *DePasquale*, 443 U.S. at 383, testimony which may help to obtain an acquittal of the defendant.

Where, as in this case, the defendant himself expresses a desire for an open trial, prior decisions rendered by this Court lead to a conclusion that the public and the press, have standing to assert rights under the Sixth Amendment. This Court has recognized, for example, that a party has standing to assert the constitutional rights of third parties if the litigating party alleges a sufficient interest in the outcome, if "the enjoyment of [a] right [by the third party] is inextricably bound up with the activity the litigant wishes to pursue" and if there is some practical impediment to the third party's ability to assert his own rights. *Singleton* v. *Wulff*, 428 U.S. 106, 112-16 (1976) (Opinion of Blackmun, J.). *See also Carey* v. *Population Services International*, 431 U.S. 678, 684 (1977) (parties are permitted "to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function"); *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965); *Barrows* v. *Jackson*, 346 U.S. 249 (1953). Granting standing to such third parties is particularly appro-

priate where the challenged statute will have a direct adverse impact on that third party. *Eisenstadt* v. *Baird*, 405 U.S. 438, 445-46 (1972) (distributor of contraceptives can assert constitutional rights of individuals to receive contraceptives).

Principles drawn from the foregoing cases strongly support a conclusion that, as a party directly affected by a closure order entered under § 16A, the *Globe* has standing to assert the Sixth Amendment rights of criminal defendants who desire an open trial. The closure order has a direct impact on the *Globe* and it prohibits activity in which the *Globe* desires to engage. The *Globe's* interests are "inextricably bound up" with the criminal defendant's interest in having his trial publicized so that abuses may be detected and curbed and so that potential witnesses will come forward and testify. Particularly where, as here, the criminal trial ends in an acquittal, the criminal defendant's public-trial claim may be moot in every sense of the word for he cannot be retried for the same offense and any assertion that he might be faced with a closure order in a future trial for a future alleged violation of the same statute would be wholly speculative. Imminent mootness of the criminal defendant's public-trial claim thus is a very real and practical impediment to its vindication each time that claim is made. *Compare Singleton* v. *Wulff*, 428 U.S. 106, 117-18 (1976) (Opinion of Blackmun, J.).

Beyond that, with respect to a criminal defendant who desires a public trial — at least a public trial to which no one voices objection — the *Globe's* position is no different than that of a consumer who desires to receive information an advertiser is willing to provide. Its position is that of a willing recipient of information a speaker is willing to have it receive. Accordingly, it should have standing to assert not only the rights of the criminal defendant but its own rights as well. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Con-*

sumers Council, 425 U.S. 748 (1976); *Procunier* v. *Martinez*, 416 U.S. 396 (1974).

The right to a public trial is so firmly engrained in our notions of ordered liberty that it stands among very few of the absolutes contained in the Bill of Rights as to which this Court, despite the passage of nearly 200 years, has not squarely announced an exception. That fact, coupled with the critical role in the pursuit of justice played by the public trial, implies, if indeed it does not dictate, that a criminal trial may not be closed, in whole or in part, over the objection of a defendant unless closure is inescapably necessary to safeguard a state interest of the highest order, unless there are no less drastic methods available for pursuing that interest and unless it is clearly demonstrated that the closure order will effectively guard against the perceived danger. *See, Gannett Co., Inc.* v. *DePasquale*, 443 U.S. 368, 441-42 (1979) (Blackmun, J., concurring in part and dissenting in part). *See generally, Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

Section 16A as construed and applied meets none of those criteria. The state interests assertedly served by the statute are both speculative and vaguely defined. The statute, both in its mandatory and in its discretionary role, takes no account of the desires of the individual it is supposed to protect, countenances no suggestion that protection may be afforded through more moderate means and permits no evaluation of the harm from which protection is sought. Finally, as an effective refuge from conceivable harm, the statute is seriously deficient. In sum, when measured against a Sixth Amendment right to a public trial, § 16A simply cannot stand.

Conclusion.

For the foregoing reasons, probable jurisdiction should be noted, and M.G.L. c. 278, § 16A as construed by the court below should be declared unconstitutional.

Respectfully submitted,

JAMES F. McHUGH,
ROBERT HAYDOCK, JR.,
AMY B. COHEN,
BINGHAM, DANA & GOULD,
100 Federal Street,
Boston, Massachusetts 02110.
(617) 357-9300

Appendix.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
SUFFOLK, SS.

THE GLOBE NEWSPAPER COMPANY

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK.

Petition for Extraordinary Relief Pursuant to Mass. General Laws Chapter 211, Section 3

Now comes plaintiff, The Globe Newspaper Company, (the "plaintiff") and respectfully represents:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts with a principal place of business in Boston, Massachusetts. It is the publisher of The Boston Globe, a newspaper of general circulation in the City of Boston and elsewhere.

2. Defendant, The Superior Court for the County of Norfolk, ("Norfolk Superior Court") is the court which by statute has jurisdiction over certain criminal cases arising within the Commonwealth of Massachusetts and within the venue of Norfolk County.

3. On or about April 19, 1979, the Norfolk Superior Court commenced hearings with respect to preliminary motions in the case of *Commonwealth of Massachusetts v. Albert Aladjem*, Norfolk Superior Court, No. 73102-9. At that time, the Norfolk Superior Court caused to be placed on the courtroom

door a sign which stated "closed." All persons approaching the courtroom doors were told by courtroom personnel that they may not enter the courtroom. Subsequently, certain members of the press were told by court personnel that they could enter the courtroom during the preliminary hearings. On information and belief, one reporter was allowed to enter the courtroom and was informed by Judge Mulkern that the reporter could remain in the courtroom, but should not publish any information that was disclosed in the course of the hearings on preliminary motions.

4. On, April 24, 1979, counsel to the plaintiff went to the Norfolk Superior Court. Counsel was informed that the hearings for that day had been terminated. Judge Mulkern told counsel that the hearings would continue the following day.

5. On April 25, 1979, at the commencement of the proceedings before Judge Mulkern, counsel for the plaintiff filed with the clerk three motions (1) a motion to revoke orders concerning exclusion of the press; (2) a motion for hearing; and (3) a motion to intervene. These documents are attached hereto as Exhibits A-C respectively. The motion to intervene requests that the plaintiff be allowed to intervene for the limited purpose of asserting its rights to access to the trial and hearings on the related preliminary motions. The motion to revoke prior orders refers to prior proceedings of the Court, where the press had been excluded, and requested a transcript of those proceedings. The motion for hearing requested that the plaintiff be granted an opportunity to be heard before the Court with respect to orders excluding the press from the trial and related hearings on preliminary motions.

6. At the commencement of the proceedings, before the Court, Judge Mulkern held that plaintiff's motions would not be accepted for filing. Without the opportunity for hearing requested by plaintiff and without argument of counsel, the Court further ordered that pursuant to G.L. c. 278, § 16A, the

trial would be closed and the press and general public would be excluded. A copy of the transcript relating to these orders is attached hereto as Exhibit D.

7. Counsel to the defendant objected to the Court's order that excluded the press and public.

8. The Assistant District Attorney for the Commonwealth stated that the exclusion of the press and public is not requested by the Commonwealth.

9. The refusal of the Norfolk Superior Court to permit members of the press to be present at the trial constitutes an impermissible burden on the plaintiff's right to gather and disseminate news, is supported by no compelling state interest and is in violation of the First Amendment to the Constitution of the United States and Articles XVI and XXIX of the Massachusetts Constitution.

10. To the extent that G.L. c. 278, § 16A is construed as authority to exclude members of the press from a trial where the defendant requests a public trial and the presence of the press, that statute is in violation of the Sixth Amendment to the Constitution of the United States and Article XII of the Massachusetts Constitution.

11. The trial, including the inpanelment of the jury in this case is scheduled to commence tomorrow, April 26, 1979 and the orders barring entry to those proceedings by the press remain in effect.

12. Plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays that:

1. A short order of notice issue to defendant commanding it to appear forthwith and answer the allegations of this Complaint.

2. That a temporary restraining order issue forthwith commanding defendant to permit members of the press to attend the trial in the case, *Commonwealth of Massachusetts v. Aladjem*, Norfolk Superior Court, Docket No. 73102-9.

3. That this Court issue a permanent injunction ordering defendant to permit members of the press to attend the trial and proceedings in the case of *Commonwealth of Massachusetts v. Aladjem*.

4. For such other, or further, relief as this Court deems meet and just.

By its attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

Exhibit A.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
A3102-9

COMMONWEALTH OF MASSACHUSETTS

v.

ALBERT ALADJEM

Motion to Revoke Orders Concerning Exclusion of the Press

The Globe Newspaper Company (the "*Globe*") moves that this Court enter an Order revoking any prior Orders of the Court which exclude the press, including the *Globe* from the trial and related hearings on preliminary motions in the above-captioned case and/or which prohibit the publication of information disclosed in said proceedings. The Globe also moves that a transcript of the proceedings be made available.

By their attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

DATED: April 25, 1979

Exhibit B.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
73102-9

COMMONWEALTH OF MASSACHUSETTS

v.

ALBERT ALADJEM

Motion for Hearing

The Globe Newspaper Company moves that it be granted an opportunity for hearing before this Court with respect to any Orders of this Court which exclude the press from the trial and related hearings on preliminary motions in the above-captioned case and/or which prohibit the publication of information disclosed in said proceedings.

By their attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

DATED: April 25, 1979

Exhibit C.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
73102-9

COMMONWEALTH OF MASSACHUSETTS

v.

ALBERT ALADJEM

Motion to Intervene

The Globe Newspaper Company hereby moves for leave to intervene in these proceedings for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions in connection with the above-captioned case.

By their attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

DATED: April 25, 1979

Exhibit D.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS: SUPERIOR COURT
No. 73102-9

COMMONWEALTH

v.

ALBERT T. ALADJEM, JR.

Third Criminal Session
Dedham, Massachusetts
Wednesday, April 25, 1979

Transcript of Hearing on Motions

BEFORE: Hon. Robert V. Mulkern, Associate Justice

APPEARANCES:

Ms. Ruth McNiff, Assistant District Attorney,
For the Commonwealth
Paul T. Smith, Esq. and Harvey R. Peters, Esq.
Co-Counsel, For the Defendant

[2] *Wednesday, April 25, 1979*

THE COURT. Now, with respect to the case on trial, I have been handed three motions.

Do counsel for the respective parties have copies of these motions?

Ms. McNiff. No, Your Honor.

Mr. Peters. No, Your Honor.

The Court. One is entitled a "Motion to Intervene" and it is signed by Attorney Thomas Walsh, I believe, and another attorney.

Another is a Motion For Hearing With Respect to Any Orders of the Court Relating to Exclusion of The Press.

And the third is a Motion to Revoke Orders concerning exclusion of the press.

Would counsel for the respective parties now have copies of those motions?

Mr. Smith. Yes, Your Honor.

The Court. Do you, Miss McNiff?

Ms. McNiff. Yes, Your Honor, I do.

The Court. Would you like a moment to read them?

Ms. McNiff. Yes, I would.

The Court. Please do.

[Pause.]

[3] The Court. Have counsel now had an opportunity to read this motion?

Ms. McNiff. Yes, Your Honor.

Mr. Peters. Yes, Your Honor.

The Court. I will take, first, the Motion to Intervene, which has not been filed.

It has simply been handed to the Court. The case before the Court, the criminal case of Commonwealth v. Aladjem, involves three high school girls, ages at the time of the offense, 15, 16 and 17, respectively; and I ask to be corrected by Miss McNiff if I am wrong in what I say.

Ms. McNiff. You are correct, Your Honor.

The Court. The ages, now, are 16 and 17; am I correct on that?

Ms. McNiff. Sixteen, sixteen and seventeen.

The Court. Sixteen, sixteen and seventeen.

The three girls are high school students as of this time. The allegations of the indictments contain allegations of forcible rape and allegation of forced unnatural rape, in at least one instance.

Am I correct, Miss McNiff?

Ms. McNiff. You are correct, Your Honor.

The Court. The statute in question is General Laws Chapter 278 Section 16A, which provides that at a [4] trial of indictments such as are before the Court, when the alleged victims are under eighteen years of age, the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case. This statute parallels, in a general way, General Laws Chapter 119 Section 65, which provides that in a juvenile session, where a defendant is a juvenile, the Court shall exclude the general public from the room admitting only such persons as may have a direct interest in the case.

This Court rules that the Motion to Intervene may not be filed. That the Globe Newspaper Company, which is named in the body of the motion, is not a party to the litigation on trial before the Court. This Court further rules that, consistent with General Laws Chapter 278 Section 16A, this trial will be conducted in such a manner that the general public shall be excluded from the courtroom, including the press, and that only such persons as may have a direct interest in the case will be permitted in the courtroom.

This ruling and Order results from a reading of the statute and from the feeling of the Court that a child-victim of an alleged sexual attack is entitled minimally to at least the same protection that a child-[5] defendant in a case involving sexual matters has.

I will advise the representatives of the Globe newspaper that are present in the courtroom that it is not anticipated that impanelment of this case will commence until tomorrow, for whatever action those representatives care to take.

Okay.

I am returning the papers which have been presented to the Court.

Ms. BARRY. Pardon me, Your Honor. My name is Janice Barry and I represent the Globe Newspaper Company.

Is Your Honor also ruling that the Globe's Motion For a Hearing on the Closure Order is also denied?

THE COURT. Well, Miss Barry, I took the motions in what I thought was an appropriate order. Since I will not accept for filing the Motion to Intervene, for the reason that I have indicated, basically a question of standing, then I am not going to act upon any other motions.

Ms. BARRY. Then, Your Honor, as I understand, is saying that the Globe has not standing to be heard before Your Honor?

THE COURT. I am saying no more. I am not [6] accepting for filing the Motion to Intervene.

Ms. BARRY. Thank you, Your Honor.

THE COURT. You are welcome.

MR. PETERS. Would Your Honor note the Defendant's exception to so much of Your Honor's ruling as excludes the general public and the press from the trial in this case.

THE COURT. You have made your exception.

[Defendant's exception noted.]

Ms. MCNIFF. Not to be technical, Your Honor, but, for purposes of the record, may the record indicate that Your Honor's ruling was on Your Honor's own motion and not at the request of the Commonwealth?

THE COURT. His Honor's ruling was made on the basis of the statute which appears at least to be mandatory.

Ms. MCNIFF. I understand that, Your Honor.

Thank you.

Okay. Let's proceed with the — I am sorry, gentlemen.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:
No. 79-191 CIV.

SUPREME JUDICIAL COURT
BRAUCHER, J.

THE GLOBE NEWSPAPER

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

Appearances:

Charles J. Hely, Assistant District Attorney
618 High Street
Dedham, Massachusetts 02026

Margot Botsford, Assistant Attorney General
1 Ashburton Place
Boston, Massachusetts

James F. McHugh, Esq.
100 Federal Street
Boston, Massachusetts

April 26, 1979
Full Court Room-13th floor
New Court House
Boston, Massachusetts

[Partial Transcript of Proceedings.]

The Proceeding

COURT: Mr. McHugh, this is your application, I believe.

* * * * * * * * *

MR. MCHUGH: Thank you, Your Honor. Your Honor, this is an application, as the complaint reveals, under General Laws 211, Section 3, for an order requiring the Justices of the Norfolk County Superior Court to open to the press a criminal trial, which yesterday the Court ordered closed. Factually, the matter arose in essentially the following manner. There had been a series of pretrial hearings, which the Court was holding in this case. A case which involves allegations of rape of three women, ages [2] sixteen, sixteen, and seventeen, I believe, current ages, in the town of Wellesley. During the last several days a number of pretrial hearings had been held by the Court and all of those hearings had been closed to the press and to the public. At some point yesterday, the Globe became aware of the possibility that an order would be entered seeking to close, or ordering closed, the trial itself. And thereupon, counsel for the Globe went to the Norfolk Superior Court and attempted to talk with the Judge and determine what the Court's views in that regard were. The Court said, as I understand it, that it would take the matter under advisement and would have some kind of a decision ready the following day, which was yesterday, April 25th. On yesterday, the Globe filed with the Court . . ., or more precisely, went to the Court after attempting to determine who the appropriate Clerk to receive the papers was, and finally finding the Judge's court room Clerk, gave to that Clerk a motion to intervene for the limited purpose of asserting its right to attend the trial sessions. A motion for a hearing, prior to entry of any cloture order, and a motion for a revocation of any prior cloture orders that had been entered. The Court, as the transcript attached to our complaint reveals, denied the Globe's motion to intervene and said that it would not take up any of the other

motions, and in addition, entered an order stating that the trial would be closed to the press and to the public under the [3] authority of General Laws Section 16A.

COURT: Well, I don't want to foreclose anybody else from making a point. But, it seems to me, that your procedure adequately raised the question whether the Globe has any right to have the trial public . . .

MR. MCHUGH: All right.

COURT: . . . In the face of the statute. And, I think, maybe you should direct your attention to that.

MR. MCHUGH: All right, Your Honor. We believe, and I am going to urge the Court today, that chiefly for three reasons . . . four reasons the lower court's order was invalid. Succinctly and in summary form put, those are that Section 16A does not by construction require the result the Court reached in this case. Second, that if it does, it is unconstitutional under the First Amendment to the Constitution of the United States. In addition, if it does, it is unconstitutional under the Sixth Amendment to the Constitution of the United States. And finally, that wholly apart from the substantive result one reaches in consideration of those issues, it is a denial of the First Amendment Rights of the press to enter such an order without some form of a preliminary hearing addressed to the merits of the issue concerning whether the trial should be closed.

* * * * * * * * *

[11] COURT: Thank you, Mr. McHugh. Now, Ms. Botsford [Assistant Attorney General Representing the Superior Court for the County of Norfolk] I understand the District Attorney wants to be heard here. I don't know whether you want to be heard before or after.

MS. BOTSFORD: I'll be heard after.

MR. HELY: Just briefly, Your Honor.

COURT: This is Mr.?

MR. HELY: Hely.

[12] COURT: Hely.

MR. HELY: and I don't purport to interfere with, or attempt to represent the Justices of the Court, Your Honor, simply as an intervenor, or as amicus to the Court making clear the District Attorney's position in the underlying criminal action. And, that was before the trial judge, and before this Court today, that we do not oppose the presence of the press in this case. We are fully aware of the statute, Chapter 278, Section 16A. And the interests that we identify primarily are the interests of persons under eighteen who are victims of sex crimes, or as so labeled in the statute. And a special privacy interest in those persons, which according to the statute, outweigh the normal rights of the defendant to a public trial and the normal rights of the public to have access to those trials. And in these special circumstances they outweigh. But our position before the trial judge, and it is before this Court, that in some circumstances a trial judge, when the defendant is asserting his right to a constitutional, public trial, a trial judge may consider that as outweighing the otherwise legitimate statutory interests, particularly where the Commonwealth on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press. The constitutionality of the statute, we are not seeking to undermine in [12] any sense. We are simply seeking to have a fair trial in this case in which the guilty person can be found guilty if he is guilty. And the fair trial can proceed without error in the record to subject the Commonwealth and the victims to a new trial. And we also wanted to make it clear here this morning that the victims have been held for trial, the three victims, ages 15, 16, and 17, have been held in the courthouse, held for trial since April 17th and today, I

think, is the eighth day where we are ready to impound. We have had a long series of pretrial motions in which the victims have testified, been subjected to a lot of cross-examination, and it is an extremely high level of anxiety and emotional stress on these people. And, the Commonwealth just simply seeks to go forward today and not have a stay in this case, regardless of your determination of the correctness of the trial judge's ruling we ask that it be a prompt determination one way or the other. And we simply wanted the Court to know that we didn't oppose the access to the press in this case.

COURT: Thank you, Mr. Hely. Before we hear from Ms. Botsford, I would like to also inquire . . . I have not gotten a proof of service here . . . Oh, I do have affidavit of notice, delivery to the Attorney General. But, you said notice was given to the defendants here?

MR. MCHUGH: It was by telephone, Your Honor.

COURT: Telephone notice.

[14] MR. MCHUGH: We, also, yesterday afternoon called the Clerk of the Norfolk Superior Court to inform her that the action was pending here with a request to so notify the defendant in the event that we weren't able to reach them, but we did reach them last night.

COURT: All right, thank you.

MR. HELY: But the defendants, I think, were also under direct order from Judge Mulkern to be there today at 10:00 in Dedham, ready for the Judge's final ruling on the motion to suppress and possibly an impoundment this morning. So, I can understand their absence here today.

COURT: I understand. All right, Ms. Botsford.

MS. BOTSFORD: Your Honor, I have a memorandum here, which I can give to you.

COURT: Go ahead.

MS. BOTSFORD: Your Honor, Judge Mulkern opposes any reversal of his order precluding the press from the trial on sev-

eral grounds. First, as he interprets Section 16A, it requires the exclusion of the press. Second, even if the Court should . . . this Court should find that it is not a mandatory exclusion, he would exercise his discretion and require the exclusion of the press, because he thinks that the rights of the minor victims here demand . . . the rights of privacy demand protection. We believe that if Section 16A is construed to require, or at least to [15] authorize in a Judge's discretion the exclusion of the press, it is constitutional. It does not violate the First Amendment Rights of the press, nor the Sixth Amendment Rights of the defendant. We also contend that the press does not have standing to raise the rights of the defendant to a public trial under the Sixth Amendment.

* * * * * * * * *

[24] COURT: I am not disposed to postpone decision here. As I understand it, it was scheduled to go on with the selection of the jury today. Now, I have been informed that Judge Mulkern has put that off until tomorrow.

MS. BOTSFORD: Oh.

COURT: So that we are not under an particular gun . . .

MS. BOTSFORD: When I spoke to him he said he would wait until 11:00, but I guess he has pushed it back some more.

COURT: Well, this is all the information . . . just a report . . .

MS. BOTSFORD: Right. It is later than when I spoke to him.

COURT: But, either way I am not disposed to . . . I mean this thing . . . Obviously, they are trying to expedite the trial of that case. And I think it can go forward either with, or without the press and I am not disposed to delay things. So, I am getting ready to . . . I've been reading your memorandum, so I won't be accused of denying the Commonwealth a hearing. I am getting ready to . . . I think I am going to decide this before I leave the bench. So, I don't need that . . . I do want to get

some help from Mr. McHugh on what he has to say about *Depasquale*. Have I correctly [25] inferred what that is about?

MR. MCHUGH: You have, Your Honor. But, that case, as Your Honor correctly observed, involved the defendant who wanted things closed, and it only dealt with pretrial proceedings . . .

COURT: Pretrial?

MR. MCHUGH: It has nothing to do with the trial itself.

COURT: Now, in the case before us, we are talking about the trial itself, exclusively. There is no problem . . . The statute, in terms, talks about trial and does not seem to say anything about pretrial.

MR. MCHUGH: That is correct, Your Honor. And we have intentionally not raised here any issues about pretrial . . .

COURT: I mean it might well be read that the trial is a whole process and the pretrial proceedings are a part of it. But, on its face, it just says trial. And that is what we are talking about here is trial.

MR. MCHUGH: That is correct.

COURT: All right.

MR. MCHUGH: On another day we might be back to visit with you . . .

COURT: But, I am right that the New York Court of Appeals, is that who it was in *Depasquale* . . .

MR. MCHUGH: *Depasquale*. That is correct. The Court of Appeals for the State of New York.

COURT: This is all not memory, but inference . . .

[26] MR. MCHUGH: Well, basically . . .

COURT: . . . That I just associate *Gannett Co.* with upstate New York.

MR. MCHUGH: Let me tell you briefly what happened, if Your Honor would like me to.

* * * * * * * * *

[27] MR. MCHUGH: One other point that was raised, Your Honor. The objection of the defendants to the cloture of these hearings is incorporated in the transcript, which is attached to the complaint. And on the last page of the transcript the defendant asks that his objection to the Court's order closing the proceedings be noted.

COURT: I think I had seen that, but I . . . Who is counsel for the . . .

MR. MCHUGH: Mr. . .

COURT: Mr. Peters is it?

MR. MCHUGH: Peters.

COURT: Because I . . . It says, "Mr. Peters: Would Your Honor note the defendant's exception to so much of Your Honor's ruling as excludes the general public and the press from the trial in this case? COURT: You have made your exceptions." So, I think that supports your point.

* * * * * * * * *

[29] COURT: Thank you. I do think that this is one which I ought not to take time to write a great essay about. I propose to go through the issues right now and dispose of this. What I rule on the [30] law is not likely to conclude the matter. These are large issues which are dealt with at a higher level. But we do have to decide what is to happen on this particular case. First as to the statute, it is mandatory in its terms. But, I don't . . . I think I have to decide whether it is utterly mandatory so that it overrides the desires of everybody, prosecutor, victims, defendants, judge and so forth, because even if you allow some room for waiver by the defendant and the prosecutor, I think the Judge must have some discretion as to what he will do with that. And, I am not in the position here to say that he abused such discretion as he had, because, obviously, he had been

through a number of proceedings with respect to this case, which are entirely a closed book to most of us who are here this morning. So I think we are confronted with the constitutional issue. My reading of the First Amendment cases on this is that if you once open a trial there is no such thing as opening it part way. Once you have opened it, it is opened all the way. And the only way to avoid complete publicity is to close the hearing. Now, you can close it and still allow certain people in, obviously the people who have to be there. And apparently, our court has said you can bring in relatives and friends of the defendant. I cannot believe that giving the Judge some discretion in matters of this kind violates the First Amendment anymore than an order for the sequestration of witnesses violates the First Amendment. I don't understand [31] that a newspaper reporter is anything but another citizen who . . . and there is no such thing as having a status conferred by law by being employed by a newspaper or by some other . . . one of the public media that any citizen is free to write a book, fill out a handbill, circulate it, publish it, put it on a plaque and publicize it. And he has just as much right as any newspaper reporter. Now, . . . I'm leaving aside the question whether there may be a difference between the relatives and friends of the defendant and members of the public generally. I suppose you can be admitted . . . For example, a lawyer may be admitted to a proceeding on some understanding that he, at least, will not become a newspaper reporter. So, I don't think the First Amendment point is made out. If there is a requirement under the First Amendment of having a hearing, it seems to me that probably that was satisfied. Although rather summarily satisfied when the Judge did hold a hearing on the question of whether the Globe should be permitted to intervene. I take it, not a great deal of argument was permitted on that. But, it is not clear to me that much had to be said. So, that brings us to the Sixth Amendment right. And I must say,

I find that the most troublesome part of this. And what I say will not conclude the matter. And, I take it this is where the District Attorney is in a rather difficult situation here. If this case goes forward over the defendants's objection and exception as a closed trial and that turns out at some later date [32] to have been an error, the trial may turn out to be a wasted exercise which will have to be done over again. And, what I say today isn't going to have any effect on that, because I don't think even though the defendant has been notified of these proceedings, I don't think he can be thought to be a party in the sense that he would be bound by any ruling that I would make. And that of all this is, that I am not going to interfere on an interlocutory basis with the ruling of the trial judge. My power to do so, under Chapter 211, Section 3, is a power which exists only when no other remedy is provided. And the defendant, a least, has a remedy by appeal. I don't want to try and advise the Globe Newspaper Co. as to whether they have any other remedy, but I am doubtful about their standing to raise the Sixth Amendment issue. So the result will be that this petition will be denied. The Court will be in recess.

— THE END OF TAPE —

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 79-191 CIVIL

THE BOSTON GLOBE

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

Order

This case came before the Court on the plaintiff's petition for extraordinary relief pursuant to G. L. c. 211, § 3.

There was argument by counsel for the plaintiff and by the assistant attorney general. The assistant district attorney made a statement to the Court on behalf of the prosecution in the underlying criminal matter.

Upon consideration thereof, it is ORDERED that the petition be, and it is hereby, denied.

BY THE COURT (BRAUCHER, J.)

JOHN E. POWERS,
CLERK.

ENTERED: April 26, 1979

A true copy.

Attest:

4-27-79 JEAN M. KENNETT
Asst. Clerk.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 79-191 CIVIL

THE GLOBE NEWSPAPER

vs.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

Judgment

This case came on for hearing before the Court, Braucher, J. presiding, and the issues having been duly heard and an order entered,

It is ORDERED and ADJUDGED,

that the petition be, and it is hereby, dismissed.

Dated at Boston, Massachusetts, this seventh day of May, 1979.

JOHN E. POWERS
Clerk of Court

A true copy.
Attest:

JOHN E. POWERS,
Clerk of Court

May 8, 1979

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, February 26, 1980

IN THE CASE No. SJC- 1825

GLOBE NEWSPAPER COMPANY

vs.

SUPERIOR COURT

pending in the Superior Court for the County of Norfolk No. 79-191

ORDERED, that the following entry be made in the docket; viz., —

Appeal dismissed in accordance with the opinion.

BY THE COURT,

PATRICK J. HURLEY, Clerk.

February 26, 1980

See opinion on file.

SUPREME JUDICIAL COURT

GLOBE NEWSPAPER COMPANY
vs.
SUPERIOR COURT

Suffolk. October 9, 1979. — February 26, 1980.

Present: HENNESSEY, C.J., QUIRICO, KAPLAN, WILKINS, LIACOS, ABRAMS, JJ.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on April 25, 1979.

The case was heard by *Braucher*, J.

James F. McHugh (*Janis M. Berry* with him) for the plaintiff.

Mitchell J. Sikora, Jr., Assistant Attorney General (*Allen B. Sherr*, Assistant Attorney General, with him) for the defendant.

Marguerite M. Dolan, for the Greenfield Recorder, amicus curiae, submitted a brief.

James C. Heigham, for the Massachusetts Newspaper Publishers Association, amicus curiae, submitted a brief.

Thomas G. Simons, District Attorney, & *Stephen R. Kaplan*, Assistant District Attorney, for the District Attorney for the Northwestern District, amicus curiae, submitted a brief.

LIACOS, J. On April 25, 1979, the plaintiff, Globe Newspaper Company (Globe), petitioned a single justice of this court for extraordinary relief pursuant to G. L. c. 211, § 3. The petition challenged the April 25, 1979, order of a trial judge of defendant Superior Court, who acted under the authority of G. L. c. 278, § 16A, to close a criminal trial to the general public. The judge had denied the Globe's motion to

intervene and had denied the Globe's motion for a hearing and motion to revoke the order concerning exclusion of the press. Thus, the Globe sought from the single justice a temporary restraining order and permanent injunction ordering the judge to permit members of the press to attend the trial and related proceedings. On April 26, 1979, as the jury in the criminal trial were being empanelled, a single justice conducted a hearing on the Globe's petition and denied it after stating orally his reasons for his decision. A judgment was entered on May 7, 1979.[1] The Globe appeals. Mass. R.A.P. 1 (b), 365 Mass. 844 (1974).

During the pendency of this appeal, the criminal trial proceeded to its conclusion. Thus, the issue raised before the single justice is now moot, and the appeal from his judgment must be dismissed. The issues raised by this record, however, are significant and troublesome, and are "capable of repetition yet evading review." *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911); *Gannett Co.* v. *DePasquale*, U.S. , (1979).[a] We deem it appropriate therefore to express our views on the issues argued. *Wellesley College* v. *Attorney Gen.*, 313 Mass. 722, 731 (1943). In so doing, we consider matters now part of the record, but which were not put before the single justice.

Although neither the single justice nor this court is compelled to take the allegations in the Globe's petition as true, we may do so in light of the circumstances that the Commonwealth did not file an answer, Mass. R. Civ. P. 8 (d), 365 Mass. 749 (1974), and that the facts alleged in the petition are not disputed. The petition shows that on or about April 19, 1979, the Superior Court in the County of Norfolk commenced hearings with respect to preliminary motions in the case of Commonwealth *vs.* Albert Aladjem, Norfolk Su-

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[1] The opinion of the United States Supreme Court in *Gannett Co.* v. *DePasquale*, U.S. (1979) (99 S. Ct. 2898 [1979]), had not been given at the time of the hearing before the single justice.

[a] 99 S. Ct. 2898, 2904 (1979).

perior Court, No. 73102-9. The court caused a sign marked "closed" to be placed on the courtroom door, and court personnel turned away people seeking entry.[2] After failing to gain entry on April 24, 1979, counsel for the Globe on April 25 attempted to file with the court the motion to intervene and the other two motions. At the commencement of proceedings before the court, the judge ruled that he would not accept the Globe's motions as being proper for filing. Without holding a hearing and without argument of counsel, the judge ordered that the trial be closed and the press and general public excluded. Counsel for the defendant objected to the closure order, and the assistant district attorney stated that the Commonwealth did not request closure.

The transcript of the hearing before the judge is annexed to plaintiff's petition. It reveals that the Aladjem case involved three girls, ages sixteen, sixteen and seventeen at the time of trial. The indictments contained allegations of forcible rape and forced unnatural rape. The judge ruled that G. L. c. 278, § 16A, requires closure. He stated, "This ruling and Order results from a reading of the statute and from the feeling of the Court that a child-victim of an alleged sexual attack is entitled minimally to at least the same protection that a child-defendant in a case involving sexual matters has."

At the April 26 hearing before the single justice, the Globe and the Attorney General appeared. The assistant district attorney also appeared and stated: "[W]here the defendant is asserting his right to a constitutional, public trial, a trial judge may consider that as outweighing the otherwise legitimate statutory interest, particularly where the Commonwealth on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press."

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[2] Court personnel later told some members of the press that they could enter during the preliminary hearings. Apparently one reporter did enter, but the judge told him that he should not publish information received at the hearing.

In a supplemental statement, the parties stipulated to facts concerning events after the April 26 hearing. In an April 30 conference with the trial judge, the assistant district attorney represented that she had spoken with the three victims about the presence of the press in the courtroom; the victims stated that they would not object to inclusion of the press if the press promised not to print any personal data about them, photograph them, or attempt to interview them. On May 10, 1979, following a jury trial, the defendant Aladjem was found not guilty.

The Globe argues that the single justice erred in denying its petition, claiming that G. L. c. 278, § 16A, did not authorize the judge to exclude the press from the Aladjem trial. This argument relies not only on statutory language and purpose, but also the principle that a statute should be construed to avoid constitutional doubts. We agree in part that the order closing the entire trial was in error. The Globe also raises several constitutional issues. The Globe contends that the First Amendment to the Constitution of the United States and art. 16 of the Declaration of Rights to the Constitution of Massachusetts protect the right of the public and press to be present during the conduct of criminal trials. In particular, the Globe argues that G. L. c. 278, § 16A, is overbroad and was applied unconstitutionally in this case. Also, the Globe maintains that the trial court's failure to hold a hearing on the closure issue violated the Globe's rights to due process of law. Finally, the Globe argues that the Sixth Amendment creates a right in the public to attend criminal trials. We reach only some of these questions today.[3]

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[3] Indeed, the single justice could have refrained from deciding any issue on the merits. Ordinarily, we will exercise our jurisdiction under G. L. c. 211, § 3, only "if no other remedy is expressly provided." Here it is arguable that the Globe might have sought a declaratory judgment that G. L. c. 278, § 16A, does not authorize exclusion of the press, and that even if it does, the statute violates the First and Sixth Amendments to the

1. The Globe argues that G. L. c. 278, § 16A, is ambiguous and is unconstitutional. Before we can turn to these constitutional arguments, we must construe G. L. c. 278, § 16A, in light of the asserted ambiguity.[4] See *Bellotti* v. *Baird*, U.S. , n.24 (1979);[b] *Poulos* v. *New Hampshire*, 345 U.S. 395, 402 (1953). In considering the claimed ambiguity, we are mindful of two principles of statutory construction. First, "[w]ords or phrases in a statute are to be given their ordinary meaning. They are to be construed according to their natural import and approved usage." *Burke* v. *Chief of Police of Newton*, Mass. , (1978).[c] "[T]he statutory language itself is the principal source of insight into the legislative purpose. . . . [W]here the language of the statute is plain and unambiguous, . . . legislative history is not ordinarily a proper source of construction." *Hoffman* v. *Howmedica, Inc.*, 373 Mass. 32, (1977).[d] However, "[i]f the language of a provision is unclear, a court may look to outside sources for assistance in

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United States Constitution and art. 16 of the Declaration of Rights. G. L. c. 231A.

However, we think the single justice was correct in hearing this matter in view of the doubts concerning the practicality of an alternative remedy in the circumstances, and in view of the significant public issues raised by the petition. We state our views for similar reasons. See *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 550-551 (1977).

[4] General Laws c. 278, § 16A, reads as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." As to the constitutionality of the "begetting" statute, G. L. c. 273, § 11, see *Commonwealth* v. *MacKenzie*, 368 Mass. 613 (1975). General Laws c. 273, § 11, was subsequently repealed by St. 1977, c. 848, § 7.

[b] 99 S. Ct. 3035, 3049 n.24 (1979).

[c] Mass. Adv. Sh. (1978) 425, 427.

[d] Mass. Adv. Sh. (1977) 1488, 1493.

determining the correct construction." *Rosenbloom* v. *Kokofsky*, 373 Mass. 778, (1977).[e]

We consider three possible ambiguities in G. L. c. 278, § 16A. First, to what part or parts of a judicial proceeding does the locution, "At the trial . . . the presiding justice shall exclude the general public," refer? Second, is the word, "shall" used in a mandatory or directory sense? Third, are members of the press "persons" with "a direct interest" in the case? The Globe urges that the latter two questions mark ambiguities in the statute, and it is at least clear that the language "a direct interest" has required construction in the past. *Commonwealth* v. *Marshall*, 356 Mass. 432 (1969). *Commonwealth* v. *Blondin*, 324 Mass. 564 (1949), cert. denied, 339 U.S. 984 (1950). Because neither party has recognized the ambiguity underlying our first question, we take time to explicate it here.

The word "trial" is itself ambiguous. In determining the meaning of a word in a statute, we look to its ordinary lexical meaning. *Burke* v. *Chief of Police of Newton*, *supra*. "Rather than using terms in their everyday sense, '[t]he law uses familiar legal expressions in their familiar legal sense.'" *Bradley* v. *United States*, 410 U.S. 605, 609 (1973) (citation omitted). In its legal definition of "trial," Webster's New International Dictionary 2705 (2d ed. 1959) suggests that the term has several senses: "In a general sense *trial* includes all proceedings from the time when issue is joined, or more usually when the parties are called to try their case in court, to the time of its final determination; in criminal law the term *trial* is, however, generally restricted to proceedings subsequent to swearing in the jury." This range of meanings also appears in Black's Law Dictionary 1675 (rev. 4th ed. 1968). Despite the dictionaries' suggestion that "criminal trial" should be defined restrictively, our older cases have endorsed a definition of "trial" as "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of

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[e] Mass. Adv. Sh. (1977) 2534, 2537.

determining such issue." *Commonwealth* v. *Soderquest*, 183 Mass. 199, 201 (1903), overruled on other grounds, *Commonwealth* v. *Penrose*, 363 Mass. 677, 679-681 (1973). This definition is broader than the lexical definition. Fact-finding hearings may occur before the jury are empanelled. A hearing to determine whether there is probable cause to bind a defendant over for trial is an example. It is not clear whether a hearing on a motion to suppress would constitute "examination . . . of the facts put in issue in a cause." Cf. *Commonwealth* v. *Soderquest, supra* (arraignment is not trial). According to our cases' definition, then, the distinction between "trial" and "pretrial" is not plain. But compare Mass. R. Crim. P. 13, 14, Mass. (1979), with Mass. R. Crim. P. 19, 20, Mass. (1979). The recent disagreement among members of the United States Supreme Court concerning the applicability to a motion to suppress of the word "trial," appearing in the Sixth Amendment, is further evidence that the distinction is blurred. See *Gannett Co.* v. *DePasquale, supra*. Indeed, it is not clear that the "trial" necessarily encompasses all events occurring after the jury are empanelled. For example, a side bar conference, a hearing of legal arguments, or a voir dire hearing held in the absence of the jury to determine the admissibility of evidence may not meet the *Soderquest* definition. Thus, "trial" has no single, irresistible interpretation.

Even if we assume that "trial" has an unambiguous meaning, the sentence, "At the trial . . . the presiding justice shall exclude the general public," is still ambiguous. "At the trial" is ambiguous, for "At" may mean "throughout," but it may also mean "at some time in" or "during parts of." Thus, the legislative order, "At the trial the presiding justice shall charge the jury," would not imply that the charge should continue throughout the entire trial. On the other hand, "At the trial the presiding justice shall maintain order in the court room" would apply throughout. The meaning of the sentence varies with the nature of the act which the judge is ordered to do. Certain acts, such as a jury charge, occur once and within a limited time. Others,

such as maintaining order, are continuous. And some acts, such as excluding the general public, can logically occur at many stages of the trial. Thus, even if "trial" has a definite signification, neither the words of the statute alone nor the nature of the act commanded settles whether G. L. c. 278, § 16A, requires partial or wholesale closure.

2. In order to resolve the ambiguities in G. L. c. 278, § 16A, we must first consider whether any principles of statutory construction should influence our analysis. At least two such principles exert pressure in this case. It is well-established that a "statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (Holmes, J.). Accord, *Commonwealth* v. *King*, Mass. , (1977);[f] *Alegata* v. *Commonwealth*, 353 Mass. 287, 290 (1967); *Worcester County Nat'l Bank* v. *Commissioner of Banks*, 340 Mass. 695, 701 (1960); *Ferguson* v. *Commissioner of Corps. & Taxation*, 316 Mass. 318, 323-324 (1944). It is also well settled that a statute in derogation of the common law should be strictly construed, so long as the construction is consistent with the statutory purpose. See *Hayon* v. *Coca Cola Bottling Co. of New England*, Mass. , - (1978);[g] *Vallin* v. *Bondesson*, 346 Mass. 748, 753 (1964); *Houghton* v. *Dickinson*, 196 Mass. 389, 391 (1907).

(a) The Globe raises several questions about the constitutionality of excluding the press from a criminal trial. In the face of those arguments and the United States Supreme Court's uncertain posture on the issues, see *Richmond Newspapers, Inc.* v. *Virginia*, Va. , decided July 9, 1979, which recently has been argued before the Supreme Court on appeal;[h] *Gannett Co.* v. *DePasquale*, *supra*, we seek to shrink the region of possible constitutional doubts

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[f] Mass. Adv. Sh. (1977) 2636, 2647.

[g] Mass. Adv. Sh. (1978) 1888, 1893-1894.

[h] 46 U.S.L.W. 3178 (No. 79-243) (appeal filed 8/14/79).

about G. L. c. 278, § 16A. Nevertheless, a number of reasons counsel against our deciding those questions today. We take care to point out that, even if we chose to decide the constitutional questions here presented, the question whether the State's interests outweigh a defendant's Sixth Amendment right to a public trial would in no way be before us; the defendant is not before this court. Furthermore, instead of deciding the moot issues of the Globe's First and Sixth Amendment rights, we await the United States Supreme Court's decision in *Richmond Newspapers, Inc.* v. *Virginia, supra.* Nor do we reach the question of press or defendant rights under the State Constitution. The Globe's contentions relying on art. 16 were not adequately argued in plaintiff's brief. Mass. R.A.P. 16 (a) (4), 365 Mass. 860 (1974). Indeed, the Globe's brief relegates the Constitution of this Commonwealth to one cursory, conclusory footnote. See *Beaton* v. *Land Court,* 367 Mass. 385, 389, appeal dismissed, 423 U.S. 806 (1975). As for State constitutional rights analogous to those arguably available under the Sixth Amendment, the Globe's brief is silent, and our Constitution is unclear, about the right to a public trial.

Finally, we decline to reach the constitutional questions because "[a] court will ordinarily 'not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.'" *Fazio* v. *Fazio,* Mass. , (1979).[1] See *Commonwealth* v. *Gustafsson,* 370 Mass. 181, 186 (1976). We can decide the present case on nonconstitutional grounds. Therefore, we do so. Also, because our second principle of construction — that statutes in derogation of the common law should be strictly construed — argues for a construction favoring publicity, our result minimizes constitutional

[1] Mass. Adv. Sh. (1978) 1539, 1553.

doubts about G. L. c. 278, § 16A. Although we do not squarely reach the constitutional questions raised today, we believe that the principles of construction we adopt bring us to a conclusion which approximates the results urged upon us by the Globe on constitutional grounds.[5] We turn to consideration of the relationship between G. L. c. 278, § 16A, and the common law.

(b) Public trials have been the rule at common law since the Anglo Saxons conducted their trials "like an ill-managed public meeting." F. Pollock, The Expansion of the Common Law 30 (1904). *In re Oliver*, 333 U.S. 257, 266 (1948). See generally *Gannett Co.* v. *DePasquale*, U.S. , - n.15 (1979).[j] *Id.* at - [k] (Blackmun, J., dissenting). Although in 1884 Mr. Justice Holmes' famous dicta stated some of the reasons for the rule, *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884),[6] this long established precept, so imbedded in our practice, required no explication until 1949. In *Commonwealth* v. *Blondin*, 324 Mass. at 569-570, while sustaining G. L. c. 278, § 16A, against a due process attack, we noted "the universal practice of our courts, especially in criminal cases, to keep the doors open, except as otherwise provided by statute."

Public trials protect against systematic use of the courts as instruments of political and religious persecution. *In re Oliver*, *supra* at 268-270. Publicity prevents abuses of a single judge's power. *Id.* at 270-271. See 1 J. Bentham, Rationale of Judicial Evidence 524 (J.S. Mill ed. 1827). The pressure of public scrutiny may deter witness perjury; *Com-*

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[5] This approximate parellelism extends not only to the substantive doctrine, but also to procedural safeguards. See section 5 *infra*.

[j] 99 S. Ct. 2898, 2908-2909 n.15 (1979).

[k] 99 S. Ct. at 2925-2930 (1979).

[6] "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

monwealth v. *Bohmer*, Mass. , n.14 (1978),[l] and may engender confidence in court officials. *Gannett Co.* v. *DePasquale*, U.S. , (1979)[m] (Blackmun, J., dissenting). Open trials may also induce members of the public to come forward with new testimony or other evidence. *Commonwealth* v. *Bohmer*, *supra* at n.14.[n] Other benefits of publicity are more abstract. As the audience of the courts' struggle to do justice, the public learns how courts work and may suggest how courts can improve. At the same time, the public experiences the drama of justice being done. Like theater, the judicial drama teaches the audience not to make the participants' mistakes — it deters criminal misconduct — and permits a catharsis — a sense that wrongs have been righted.[7] Thus, the common law practice of open criminal trials improves the quality of justice done in the courts and binds the courts more closely to the society they serve. General Laws c. 278, § 16A, was enacted against the background of the common law tradition, and that is why we said in *Commonwealth* v. *Blondin*,

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[l] Mass. Adv. Sh. (1978) 316, 330 n.14.

[m] 99 S. Ct. 2898, 2931 (1979).

[n] Mass. Adv. Sh. (1978) at 330 n.14.

[7] "[B]y publicity, the temple of justice adds to its other functions that of a school: a school of the highest order, where the most important branches of morality are enforced by the most impressive means: a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice. Without effort on their own parts, without effort and without merit on the part of their respective governments, they learn the chief part of what little they are permitted to learn (for the obligation of physical impossibility is still more irresistible than that of legal prohibition), of the state of the laws on which their fate depends." 1 J. Bentham, *supra* at 525. See Note, Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings, 91 Harv. L. Rev. 1899, 1906-1909 (1978). See also Note, The Right to Attend Criminal Hearings, 78 Colum. L. Rev. 1308, 1323 (1978). On the purpose of the criminal law to foster legal and moral responsibility in the citizenry, see generally Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958).

supra at 571: "It is to be strictly construed in favor of the general principle of publicity."

3. Recognizing the power of the principles favoring publicity, we must identify the precise interests that overmatched the common law rule and thereby justified G. L. c. 278, § 16A, in the Legislature's eyes.[8] In *Blondin, supra* at 571, we considered the Legislature's purpose in enacting G. L. c. 278, § 16A. "Doubtless it was thought that female witnesses in particular could come forward, institute complaints, and testify with less reluctance, so that more justice would be accomplished if they could be relieved from the inhibitions imposed by the presence of a curiosity impelled audience." Although this formulation is generally correct, it does not put the matter strongly enough.

Originally enacted in St. 1923, c. 251, with the title "An Act to protect witnesses under the age of seventeen at trials for certain crimes," the statute was designed "for the protection of minors from the vulgar and obscene and from public degradation." 1923 House Doc. No. 1349. In St. 1931, c. 205, the statute was revised as part of a comprehensive reexamination of the treatment of children in the Commonwealth. 1931 House Doc. No. 1200. The Special Commission Established to Investigate the Laws Relative to Dependent, Delinquent and Neglected Children, and Children Otherwise Requiring Special Care stated the statutory purpose: "To spare girls of juvenile age the embarrassment, humiliation and demoralization of testifying to all the sor-

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[8] "If the statute, because it modifies the common law, is to be strictly construed, yet the construction adopted should advance, rather than defeat, the purpose of the Legislature." *Houghton* v. *Dickinson*, 196 Mass. 389, 391 (1907). The Legislature, of course, has power to create exceptions to the rules of common law, *New Bedford Standard Times Publishing Co.* v. *Clerk of the Third Dist. Court of Bristol*, Mass. , - (1979) (Mass. Adv. Sh. [1979] 515, 522-523), and the common law itself provided for exceptions to the rule of publicity. See *Commonwealth* v. *Blondin*, 324 Mass. 564, 571-572 (1949), cert. denied, 339 U.S. 984 (1950). Thus, we said in *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 546 (1977): "These statutes do not preclude the exercise by judges of a sound discretion to impose reasonable cloture, including impoundment, in other cases when found necessary."

did details of rape, incest, carnal abuse or other crime involving sex, incidental to open trial with examination and cross-examination." *Id.* at 90.

This legislative history reveals that G. L. c. 278, § 16A, stands at the nexus of two overlapping strands of policy; the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public;[9] and the Legislature joined this solicitude for victims with the broad, paternal protection afforded children generally.[10] The rape victim's ordeal in court has been well documented.[11] It

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[9] Since G. L. c. 278, § 16A, was enacted, the Commonwealth has demonstrated sensitivity for the rape victim's plight in other ways. G. L. c. 41, § 97B (rape victim reporting, prosecuting and counseling services); G. L. c. 41, § 97D (reports of rape and attempted sexual assault must be kept confidential); G. L. c. 233, § 21B (limiting admissibility of evidence of victim's sexual history and reputation). See also *Commonwealth* v. *Gibbons*, Mass. , - , - & n.11 (1979) (Mass. Adv. Sh. [1979] 2168, 2170-2171, 2177-2178 & n.11).

[10] Many statutes are designed to protect the identity of minors who are subjects of litigation. See e.g., G. L. c. 119, § 60A (juvenile court records not open to public inspection); G. L. c. 119, § 65 (excluding public from juvenile court sessions). See also G. L. c. 119, § 60 (limiting uses of delinquency adjudication) held unconstitutional in part in *Commonwealth* v. *Ferrara*, 368 Mass. 182 (1975); G. L. c. 210, § 5C (records of adoption proceedings must be segregated); G. L. c. 276, § 100B (juvenile probation and court records may be sealed after three years from final entry). Generally, the purpose of these statutes is to prevent stigmatization of minors and to encourage rehabilitation. See generally *Police Comm'r of Boston* v. *Municipal Court of the Dorchester Dist.*, Mass. , - , - (1978) (Mass. Adv. Sh. [1978] 685, 699-700, 719-721). In the case of a juvenile defendant, the compulsion of those purposes is strong. In the case of the innocent victim of a sexual assault, the obligation not to aggravate her injuries is very strong indeed.

[11] E.g., J. Bode, Fighting Back, ch. 7 (1978); L. Brodyaga, M. Gates, S. Singer, M. Tucker & R. White, Rape and its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies, chs. 8-9 (1975) (hereinafter LEAA Report); E. Hilberman, The Rape Victim, chs. 2, 7, 8 (1976); L. Holmstrom & A. Burgess, The Victim of Rape, chs. 6-8 (1978); S. Katz & M. Mazur, Understanding the Rape Victim, chs. 12, 14, 15 (1979); J. MacDonald, Rape, 128-130 (1971); C. Bohmer, Judicial Attitudes Toward Rape Victims (D. Chappell, R. Geis & G. Geis eds. 1977); A. Burgess & A. Laszlo, When the Prosecutrix is a Child: The Victim Consultant in Cases of Sexual Assault, in Victims and Society (E. Viano ed. 1976); Libai, The Protection of the Child Victim of a Sexual Offense

has been said that "[t]he court experience, for the rape victim, precipitates as much of a psychological crisis as the rape itself."[12] In fact, the victim may feel that she has been raped twice: once by the defendant and once by the criminal justice system.[13] A rape victim who anticipates humiliation or embarrassment may choose not to come forward at all, or, if she comes forward, may abandon her participation midway through the case.[14] Even if she continues to participate in the criminal process, she may become so distressed that she cannot testify effectively.

This is especially true for the child victim of rape. The child's delicate psyche has few resources to help it withstand the trauma of sexual assault. Furthermore, "[i]t is generally agreed by child psychiatrists that the degree of psychic trauma is as much, or perhaps more, dependent on the way that the child victim is treated after discovery than at the time of the offense itself."[15] Even an adult victim confronted with the criminal justice system is typically "frightened, confused, and reticent."[16] For a child with only the barest understanding of the purposes and procedures of a trial, the act of giving evidence may be particularly difficult and bewildering.[17]

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in the Criminal Justice System, 15 Wayne L. Rev. 977 (1969); O'Neale, Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution — Or How Many Times Must a Woman be Raped, 18 Santa Clara L. Rev. 119 (1978).

[12] L. Holmstrom & A. Burgess, *supra* note 11 at 229.

[13] J. Bode, Fighting Back, ch. 7 (1978). L. Holmstrom & A. Burgess, *supra* note 11 at 235-236.

[14] S. Katz & M. Mazur, Understanding the Rape Victim, 197-198 (1979).

[15] Libai, *supra* note 11 at 980-981. See E. Hilberman, The Rape Victim, 53 (1976).

[16] LEAA Report at 105.

[17] See A. Burgess & A. Laszlo, *supra* at note 11; C. Bohmer, *supra* note 11 at 166-168. J. MacDonald, Rape, 128 (1971).

One of the most disturbing aspects of the trial for many victims is testifying in public.[18] The victim is often embarrassed to discuss intimate and painful matters before a group of strangers. The victim may also fear that she will be held up to public ridicule. A researcher has described the experience of typical child victims: "[A] child is likely either to be confused and frightened by the presence of many persons, or impressed with this unusual opportunity for enthralling a large audience with his stories. In both cases the public's presence may serve to interfere with the child's powers of recollection and narration. In addition, psychiatrists have observed that 'the victim naturally wishes to avoid publicity, the embarrassment which accompanies questioning by authorities, or courtroom experiences. Children in particular are often profoundly disturbed by this situation.'"[19] Recognizing the problem, judges and commentators have considered clearance of the courtroom during the victim's testimony.[20]

Thus, the purpose of G. L. c. 278, § 16A, is to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial. See *Commonwealth* v. *Leo*, Mass. , (1979).° In broader terms, the statute's purposes

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[18] L. Holmstrom & A. Burgess, *supra* note 11 at 227; Libai, *supra* note 11 at 979.

[19] Libai, *supra* note 11 at 1021 (footnote omitted). See E. Hilberman, *supra* note 11 at 53; S. Katz & M. Mazur, *supra* note 11 at 199-200, 233-236.

[20] C. Bohmer, *supra* note 11 at 167. LEAA Report, c. VIII. England and Israel give courts power to exclude the general public when a child victim testifies. Israel, Sweden, and Denmark provide that a court official should question the child privately for the prosecution and defense. See generally Libai, *supra* note 11 at 986-1001; C. Bohmer, *supra* at 167. So, too, a large number of the American States have excluded the public to protect the child victim, either by judicial decision or by statute. See *Gannett Co.* v. *DePasquale*, U.S. at n.19 (99 S. Ct. at 2910 n. 19), for a partial listing of American authority.

° Mass. Adv. Sh. (1979) 2245, 2249.

go beyond protection of juvenile privacy to encompass the State's interest in sound and orderly administration of justice; most important, the statute helps obtain just convictions for the types of crimes from which the victims had often suffered at the hands of the criminal justice system, while their assailants had often gone free. We now construe the statute in light of these purposes.

4. The first question that we must decide is whether the language "At the trial . . . the presiding justice shall exclude the general public" necessarily relates to closure of the entire trial. We have shown the language in question to be ambiguous, and our precedent does not illuminate the point. The legislative history, though equivocal, tends to favor a reading that the statute does not mandate closure of the whole trial. Although the 1931 Special Commission Report speaks of a "private hearing," it does not exclude the possibility that the hearing be private only in part. Moreover, the Report states the purpose of G. L. c. 278, § 16A, as, "[t]o spare girls of juvenile age the embarrassment, humiliation and demoralization of *testifying* . . . incidental to open trial" (emphasis supplied). 1931 House Doc. No. 1200 at 90. In light of the principles favoring publicity, we construe the statute to relate to closure of the trial only during the victim's testimony.[21]

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[21] The language of G. L. c. 278, § 16C, added by St. 1978, c. 316, more clearly states that the closure order may be for the entire trial or "during those portions of such trial when direct testimony is to be presented." We think this 1978 phrasing not to be inconsistent with the view we take of the earlier analogous statute (§ 16A). The Commonwealth implies that G. L. c. 278, § 16A, mandates closing the entire trial. The Commonwealth goes on to imply that in *Commonwealth* v. *Leo*, Mass. , (1979) (Mass. Adv. Sh. [1979] 2245, 2248-2249), we held that § 16A mandatorily extends the right to a closed trial to the child victim and to her alone. The Commonwealth concludes that the child may make an intelligent and voluntary waiver of her right to full or partial closure. Accordingly, a trial judge should hold a hearing on the waiver issue.

This argument misconceives our holding in *Leo*. We did not say that the victim is the only person who possesses the right to a closed trial. We said that the main purpose of the statute apparently was to protect the

We next consider whether G. L. c. 278, § 16A, requires closure of the trial during the victim's testimony. The Globe argues that the Legislature used the word "shall" in G. L. c. 278, § 16A, in a directory, rather than a mandatory, sense. That is incorrect. Although "[t]he word 'shall' as used in statutes . . . is not of inflexible signification and not infrequently is construed as permissive or directory in order to effectuate a legislative purpose," *Swift* v. *Registrars of Voters of Quincy*, 281 Mass. 271, 276 (1932); see *Myers* v. *Commonwealth*, 363 Mass. 843, 846 (1973), "[t]he word 'shall' . . . is commonly a word of imperative obligation . . .." *Johnson* v. *District Attorney for the Northern Dist.*, 342 Mass. 212, 215 (1961). "The general rule whereby directions to public officers for the protection of public or private rights are mandatory may be applied in a like manner to directions to courts." C. Sands, Sutherland Statutory Construction § 57.16 at 439 (4th ed. 1973). Thus, the mandatory construction appears preferable. Treating the statute as directory would frustrate its purposes. If she were uncertain whether she would have to testify in public, a young woman might choose not to cooperate with the police and the prosecutor. She might be deterred from coming forward at all.

Furthermore, legislative history is relevant to a determination whether a statute is mandatory or directory, and "[t]he deliberate refusal of the General Court to adopt a word which plainly would have conferred discretionary power . . . [may], in place of one whose natural purport

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Commonwealth's case by protecting its witnesses. *Id.* at 2249. Therefore, it was clear that the statute did not give a defendant the right to a hearing from which the press was excluded.

The Commonwealth's suggestion would also place the trial court in the awkward position of having to rule on a child's putative waiver of an important right. Use of a waiver doctrine in this context would entail difficult factual determinations and relatively cumbersome procedures (appointment of counsel and in some cases a guardian). It would place a heavy responsibility on even a mature child. It could also import more uncertainty into the process of testifying and make the victim's experience still more taxing.

would compel them . . . [shall], is significant of a settled intention to use the imperative word." *Rea* v. *Aldermen of Everett*, 217 Mass. 427, 431 (1941). Here the Legislature in 1923 sent the Governor a bill, 1923 House Doc. No. 1219, stating that "the court shall exclude the general public. . . ." The Governor returned the bill with amendments including a change from "shall" to "may." In an accompanying message, the Governor said, "A statute giving the presiding judge the discretion to exclude the public . . . ought to be sufficient. . .." 1923 House Doc. No. 1349. The version eventually enacted appears to have been a compromise. It provided that "the presiding justice shall, if said trial is before a district court, or may, if before the superior court, exclude the general public . . .." St. 1923, c. 251. When the Special Commission reviewed the statute in 1931, it stated: "The Commission is very strongly of the opinion that the reasons for a private hearing in such cases, now mandatory in the district courts, are equally compelling in the Superior Court, and the Commission recommends that the above section 16A be amended so that the presiding justice, whether in the Superior or District Court, shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." 1931 House Doc. No. 1200 at 90. The Legislature followed the commission's recommendation. This legislative history leaves little room for doubt that the word "shall" in G. L. c. 278, § 16A, is mandatory as to the victim's testimony.[22]

The Globe contends that it should not be excluded under G. L. c. 278, § 16A, because it is among "such persons as

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[22] This view is further supported by the language of G. L. c. 278, § 16B (inserted by St. 1949, c. 302), where, as to criminal proceedings in the district court involving husband and wife, it is stated, "[t]he presiding justice . . . may exclude the general public . . . during the trial." General Laws c. 278, § 16C (inserted by St. 1978, c. 316), deals with rape or incest trials and provides that a trial judge "may" exclude "all spectators" on request of the parties and where the defendant waives his right to a public trial in writing. The Legislature clearly knows the difference between the permissive "may" and the mandatory "shall."

may have a direct interest in the case." In *Blondin, supra* at 571, the Globe argues, we provided for liberal construction of the clause, and we said: "The intent was to distinguish between persons having a legitimate reason for being present and mere idle spectators who are often attracted in large numbers to sensational trials involving sex issues, not only to the detriment of the community but sometimes to the degradation of justice itself." Because the Globe's reporters have a legitimate reason to attend the trial, a reason unrelated to voyeurism, the Globe argues they have a "direct interest."

We have never said that the "direct interest" clause encompasses the press, and in *Blondin, supra* at 572, we expressly reserved the question. We have stated in dictum that the statute does not require exclusion of the defendant's parent, husband, wife, guardian or friend. In *Commonwealth* v. *Marshall*, 356 Mass. 432 (1969), we held that a defendant had a right under G. L. c. 278, § 16A, and the Sixth Amendment to have his mother, brother, sister, and friend present at his trial. However, including a few of the defendant's associates is an entirely different matter from including the press. Admittedly, the presence of a few more persons in the courtroom might not appreciably increase the victim's anxiety about her testimony. But the knowledge that those few extra persons were reporters who might publish her testimony to thousands would probably increase by orders of magnitude her sense of exposure, vulnerability, and alarm. We believe that a policy of admitting the press during young victims' testimony would substantially increase the risk that the Commonwealth would lose the benefit of that testimony.

5. In holding that G. L. c. 278, § 16A, is mandatory only as to the victim's testimony, we do not rule out the possibility that the trial judge might close other parts of the trial. The decision to close any part of the trial other than the victim's testimony or to close the entire trial is a matter within the judge's sound discretion. See *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 546 (1977). Because

the judge's discretion in the context of a criminal trial is well settled, we take this opportunity to provide general guidelines for the exercise of that discretion. See *id.* at 550-552; *Kennedy* v. *District Court of Dukes County*, 356 Mass. 367, 373 (1969). As we understand G. L. c. 278, § 16A, and the common law relating to closure of trials, a judge should hold a hearing before entering an order closing parts of the trial other than the victim's testimony. Although we have not ruled that the plaintiff has a constitutional interest, this view is consistent with the constitutional requirement that a party receive a hearing before suffering a deprivation of such an interest. See *Gannett Co.* v. *DePasquale*, U.S. , - (1979) (Powell, J., concurring);[p] *id.* at (Blackmun, J., dissenting).[q] We take this position because of our expressed view of the significance of society's interest in public trials.

In a case in which G. L. c. 278, § 16A, applies, the Commonwealth may move for closure of parts of the trial other than the victim's testimony or for closure of the entire trial. The issue at the hearing shall be whether such closure is necessary to serve the statutory purpose; i.e., to preserve evidence required for a just conviction. For example, if closing all or part of the trial were necessary to assure the availability of evidence of fresh complaint, see, e.g., *Commonwealth* v. *Gangi*, 243 Mass. 341, 344 (1923); W.B. Leach & P.J. Liacos, Massachusetts Evidence 133 (4th ed. 1967), the judge would be justified in ordering closure. The Commonwealth should bear the burden of showing necessity. Furthermore, because of the policy favoring publicity, an agreement between the prosecution and the defense to close the trial should not justify closure nor even be relevant to the judge's determination of necessity.

At the hearing, any person to be excluded from the trial should have an opportunity to state his objections to the

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[p] 99 S. Ct. 2898, 2916-2917 (1979).

[q] 99 S. Ct. 2939 (1979).

order.[23] The person need not file a formal motion to intervene. The public need not receive prior notice of the closure hearing. On the other hand, the court should hear a person who in timely fashion informs the court of his desire to object. The hearing should be completed expeditiously and should not ordinarily involve lengthy legal argument. On conclusion of the hearing, the judge should make findings of fact as appropriate and should rule on the necessity for closure.[24]

Since the appeal before us involves an issue now moot, it is to be dismissed.

So ordered.

QUIRICO, J. (dissenting). General Laws c. 278, § 16A, provides in pertinent part as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." It is undisputed that the criminal trial from which employees of the Boston Globe were excluded was one in which the defendant was being tried on indictments charging him with the crimes of forcible rape and forced unnatural rape on victims who were under eighteen years of age.

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[23] As we held in *Blondin*, *supra*, and *Marshall*, *supra*, the judge may not exclude certain persons with a "direct interest in the case."

[24] Although a judge might abuse his discretion or make an error of law, such an error would not warrant reversal on statutory grounds if raised on appeal by a defendant. Cf. *Commonwealth* v. *Leo*, Mass. , - (1979) (Mass. Adv. Sh. [1979] 2245, 2247-2249) (G. L. c. 278, § 16A, does not create rights in a defendant). If a defendant should raise at the hearing a constitutional objection to closure, the judge should consider the extent of his constitutional right to a public trial.

In part 1 of its opinion, the court holds that the word "trial," as used in the phrase "[a]t the trial" at the beginning of § 16A, is ambiguous. The court then discusses several principles of statutory construction as relating to ambiguous language and by the application of those principles to § 16A it concludes that when the Legislature used the word "trial" it intended it to mean only that part of the trial during which the minor victim testifies.

For the reasons stated below, I am unable to agree with that interpretation of § 16A, and I therefore respectfully dissent from the opinion in that regard.

It is clear from the court's opinion that its conclusion that § 16A "is mandatory only as to the victim's testimony" is not based on any holding that the statute is unconstitutional. The court expressly states that it does not reach the constitutional issues raised by the plaintiff. The court limits itself to the process of statutory construction of an assumedly ambiguous statute. For that purpose it resorts to several aids to interpretation, particularly the legislative history of § 16A, as originally enacted in 1923 and amended in 1931, and various articles appearing in law journals and other publications between 1969 and 1978 on the subject of the ordeal of rape victims in court. See note 11 *supra*, of the court's opinion. I likewise limit this dissent to a consideration of statutory construction, and do not reach any constitutional issues.

1. I do not believe that the words "[a]t the trial," as used at the beginning of § 16A, are ambiguous. I believe that they are used in their usual and ordinary sense, and that as such they include all of the trial proceedings starting with the empanelling of the jury and continuing through the return of the verdict or finding. There may be some exceptions thereto, e.g., voir dire hearings held in the absence of the jury to determine the admissibility of evidence, but it is not necessary for the purposes of this case to identify or define such exceptions precisely. In any event I do not believe that the clear language, given its usual and ordinary meaning, permits the drawing of a distinction between that part of the trial during which a youthful victim of a sex

crime testifies and the remainder of the trial during which any other witnesses are testifying.

The language which the Legislature used in § 16A to state its intention to require the exclusion of the general public "at the trial" of persons charged with sex crimes against young victims is not unique to that statute. In G. L. c. 119, § 38, inserted by St. 1954, c. 646, § 1, the Legislature mandated that "[a]ll hearings [of a certain type involving juveniles] shall be closed to the general public. . . ." A similar provision is found in G. L. c. 119, § 65, to the effect that "the court shall exclude the general public from the room" in which hearings are held on certain juvenile matters. General Laws c. 210, § 6, as amended through St. 1971, c. 388, provides that if, at the request of any party, a probate judge determines that an adoption hearing shall be held in chambers, "the probate judge shall exclude the general public from the hearing." Similarly, G. L. c. 278, § 16B, inserted by St. 1949, c. 302, provides that a District Court judge "may exclude the general public from the court room during the trial of any criminal proceeding involving husband and wife." I know of no claim or suggestion that these statutes should be construed to permit the closure of only certain parts of the trials to which they apply; and I know of no instances of the application of such a limitation by our trial courts as a matter of statutory construction.

It is significant to note that when the Legislature did intend to authorize the exclusion of persons from limited portions of a trial it did not use the general language contained in § 16A and other statutes cited above, but rather it chose language expressly authorizing an exclusion limited to prescribed portions of a trial. This is eloquently demonstrated by G. L. c. 278, § 16C, enacted by St. 1978, c. 316, which provides in part: "To protect the parties involved at a trial arising from a complaint or indictment for incest or rape, the trial judge may exclude all spectators from the courtroom in which such trial is being held, or from said courtroom during those portions of such trial when direct testi-

mony is to be presented," provided certain consents by the parties are first obtained.

In my opinion, a comparison of § 16A with the other statutes discussed above requires a conclusion that the Legislature is capable when drafting statutes of using language which clearly expresses its intent to exclude the general public or spectators from trials generally as distinguished from parts of trials, and that it demonstrated this in its choice of the language of § 16A in sharp contrast to that of § 16C. A comparison of those two sections leaves no support for a claim that § 16A is ambiguous as to what is meant by the words "at the trial."

2. If, as I believe, the language of § 16A is not ambiguous, then there is no need or occasion to resort to the legislative history of the statute. While "[i]t is permissible to examine records of legislative proceedings incident to the passage of a statute to illumine its doubtful language . . . its plain meaning cannot be thereby affected . . . ." *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471, 474 (1919). *Old South Ass'n* v. *Boston*, 212 Mass. 299, 304-305 (1912). "The plain meaning of a statute cannot be affected by resort to proceedings incident to its passage. Light may be sought from that source only to illumine statutory language of doubtful import. Other information than that afforded by the words of the statute can be examined only to aid in the solution of an ambiguity. We can only interpret the words of the statute: we cannot speculate as to the probable intention of the Legislature apart from those words." *Allen* v. *Commissioner of Corps. & Taxation*, 272 Mass. 502, 508 (1930).

The case of *D.N. Kelley & Son* v. *Selectmen of Fairhaven*, 294 Mass. 570 (1936), involved the question whether the selectmen were authorized by St. 1926, c. 43, § 1, to give a lease of a town wharf. *Id.* at 571, 574. The plaintiff offered, and the trial judge excluded, evidence that as originally presented to the Governor for signature the bill expressly authorized the selectmen to "lease said property in whole or in part for any purpose," that the Governor returned it with his recommendation that those words be

struck out, and that the bill after having been thus amended was enacted and became a law. *Id.* at 576. The law as enacted said that the selectmen could acquire Union Wharf in their town and that they could "maintain and operate the same as a wharf." *Id.* at 571. This court, in upholding the exclusion of the proffered evidence, said: "The words of the statute as enacted are plain and need no elucidation as to their meaning. The leasing shown by the record and assailed in this proceeding was merely incidental to the main purpose for which the wharf was acquired and in no way has interfered with that purpose." *Id.* at 576 (citation omitted).

In *Milton* v. *Metropolitan Dist. Comm'n*, 342 Mass. 222, 223 (1961), we said: "There is no need to resort to the legislative history of [the statute involved], because its words are unequivocal. Indeed, because of its clarity we should not interpret it by resorting to its legislative history." Accord, *Nichols* v. *Commissioner of Corps. & Taxation*, 314 Mass. 285, 293 (1943); *Boston Consol. Gas Co.* v. *Department of Pub. Utils.*, 321 Mass. 259, 266 (1947).

Since it is my opinion, as already stated above, that the language of § 16A, and particularly the words "at the trial" as used therein, are not ambiguous, I believe that under the doctrine developed in the cases discussed above, nothing in the legislative history can justify a departure from the plain meaning of these words.

In its opinion the court seems to emphasize that the Special Commission which recommended the amendment of § 16A in the manner later enacted as St. 1931, c. 205, said in its report (1931 House Doc. No. 1200 at 90) that the statutory purpose was: "To spare girls of juvenile age the embarrassment, humiliation and demoralization of testifying to all the sordid details of rape, incest, carnal abuse or other crime involving sex, incidental to open trial with examination and cross-examination." At the risk of repetition, it is my view that such emphasis and reliance on the report would be proper if we were dealing with ambiguous statutory language, which I do not believe to be the case. The

Legislature apparently chose language which was broader than that which would have been necessary to accomplish the more limited objective of the Commission. In these circumstances the intention of the Special Commission cannot prevail over the clear and unequivocal, albeit broader, language used by the Legislature in § 16A.

3. If this were a case where, by reason of ambiguous statutory language, we were permitted to resort to extrinsic aids for the interpretation of that language, I would prefer to resort to the aid sanctioned in *Burrage* v. *County of Bristol*, 210 Mass. 299 (1911). That case involved the question whether a statute which authorized "the expenses and costs" of disbarment proceedings meant that such sums were to be paid "as in criminal prosecutions." *Id.* at 300. This court said, *id.* at 301: "It is agreed that the practice has been for many years for the counties to pay for professional services rendered in prosecuting disbarment proceedings. Where the language of a statute is of doubtful import, the contemporaneous construction put upon it by officers thereby charged with performance of public duties is strong evidence of its meaning. The understanding and application of statutory words susceptible of different meanings, through years of practice, and sanctioned by the acquiescence of the Legislature, is significant of the intention with which they were employed originally."[1]

The case of *Swan* v. *Justices of the Superior Court*, 222 Mass. 542 (1916), involved the removal of members of a licensing board under R. L. c. 100, § 4, which provided that such removals were subject to review by the Superior Court

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[1] In many other cases involving the construction of a statute, this court has used, as an extrinsic aid, the construction given to that statute over a period of years by an administrative agency charged with the enforcement or administration of the statute, sometimes citing the *Burrage* case, *supra*, in support of that practice. See, e.g., *Cleary* v. *Cardullo's Inc.*, 347 Mass. 337, 343-344 (1964); *Mullen* v. *Board of Sewer Comm'rs*, 280 Mass. 531, 536 (1932); *Allen* v. *Commissioner of Corps. & Taxation*, 272 Mass. 502, 509 (1930); *United States Trust Co.* v. *Commonwealth*, 245 Mass. 75, 80 (1923); *Tyler* v. *Treasurer & Receiver Gen.*, 226 Mass. 306, 310 (1917).

and that "there shall be no appeal" from the decision of the court. *Id.* at 543. The issue was whether, notwithstanding the quoted language, the decision could be reviewed under a petition for a writ of certiorari, as had been done for many years, pursuant to R. L. c. 156, § 3, and R. L. c. 192, § 4, authorizing this court "to correct and prevent errors and abuses [in proceedings of trial courts] if no other remedy is expressly provided." In holding that the latter statutes prevailed, this court noted that the Superior Court had universally followed a practice in accord with those statutes, and said, "[t]he understanding and application of statutory words through years of practice by those charged with heavy official responsibility to interpret them aright, sanctioned by the acquiescence of the Legislature, is persuasive, although not conclusive, as to their correct meaning." *Id.* at 547.

If we were to resort to extrinsic aids for the interpretation of G. L. c. 278, § 16A, on the assumption that its language is ambiguous, I believe that the aid illustrated in the *Burrage* and *Swan* cases, *supra*, would support the conclusion that § 16A is not to be interpreted as narrowly as is done in this court's opinion in the present case. The court holds today that since 1931, § 16A became mandatory by reason of the amendment[2] substituting the mandatory word "shall" for the directory word "may." I believe it is proper for us to take judicial notice of the fact that almost all Superior Court judges who have had occasion to apply the statute since 1931 have proceeded on the basis that it required closure of the entire trial. I know of no instance in which a judge who made a more limited application of § 16A did so on the basis of the interpretation this day given to it by this court.

I believe that it is also proper to take notice (a) that in the past several years there has been an increase in aggressive, and perhaps concerted, action by the press in claiming a constitutional right to be present at trials which are subject to § 16A; and (b) that some judges of the Superior Court,

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[2]St. 1931, c. 205.

but very few, have either yielded to or attempted to accommodate that pressure by admitting the press under special conditions, guidelines or restraints. See *Commonwealth* v. *Leo*, Mass. , - (1979).[a] Whatever the motivation or reason for this departure from the previous universal application of § 16A to the entire trial, there is no indication that it was due to any concept that the Legislature had intended the closure to be limited to the time when the youthful victim testified. Indeed, the departure as applied in the *Leo* case, *supra*, did not take the form of the closure of a particular part of the trial. If the departure was due to constitutional considerations, it does not detract from the significance of the fact that for almost fifty years the judges of the Superior Court have treated § 16A as applying to the entire trial. That fact, while not conclusive, is in my opinion persuasive against the limitation which this court now places on the statute.

4. Although the court does not decide the constitutional issues raised by the plaintiff, their presence is a factor in the limitation which it places on § 16A. The court expressly notes the presence of these issues and says that in view thereof, and of "the United States Supreme Court's uncertain posture on the issues, [citing the *Richmond Newspapers, Inc.*, and the *Gannett Co.* cases] we seek to shrink the region of possible constitutional doubts about G. L. c. 278, § 16A." It does this in the application of the principle that a "statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

The *Richmond Newspapers, Inc.*, case has not been argued before the United States Supreme Court. In my opinion if the decision in that case or any other decision hereafter by a court enjoying supremacy in this area mandates the truncation of G. L. c. 278, § 16A, so that it applies only to the time when the minor victim testifies, there will be time enough for this court so to limit it. On the other hand,

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[a] Mass. Adv. Sh. (1979) 2245, 2246-2249.

if it becomes apparent from future controlling decisions that the truncation now declared by this court was not constitutionally required, the present holding probably cannot effectively be reversed except by new legislation.

Until there is a controlling decision on this subject by the United States Supreme Court, I do not believe that the concern expressed and protection provided by the Legislature for minor victims of sex crimes by the language of G. L. c. 278, § 16A, should be stripped from them by judicial action. The mere specter of a decision yet to be issued by the United States Supreme Court should not be a factor contributing to judicial retreat and discontinued enforcement of the legislative mandate contained in § 16A.

SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

CIVIL No. 1825

GLOBE NEWSPAPER COMPANY,
APPELLANT

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE

Notice of Appeal to The Supreme Court of the United States

Notice is hereby given that Globe Newspaper Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts of February 26, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Date: May 2, 1980

Certificate of Service

I, James F. McHugh, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 33 of the Rules of the United States Supreme Court, by mailing a copy thereof, first-class postage prepaid, to Mitchell J. Sikora, Jr., 2019 McCormack Building, Boston, MA 02108, Assistant Attorney General for the Commonwealth of Massachusetts, attorney for appellee. All parties required to be served have been served.

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Date: May 2, 1980

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
CIVIL ACTION
No. 79-191

GLOBE NEWSPAPER COMPANY,
APPELLANT

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE

Notice of Appeal to The Supreme Court of the United States

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I, James F. McHugh, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 33 of the Rules of the United States Supreme Court, by mailing a copy thereof, first-class postage prepaid, to Mitchell J. Sikora, Jr., 2019 McCormack Building, Boston, MA 02108, Assistant Attorney General for the Commonwealth of Massachusetts, attorney for appellee. All parties required to be served have been served.

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Date: May 2, 1980

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPREME JUDICIAL COURT
CRIMINAL ACTION
No. 73102-9

GLOBE NEWSPAPER COMPANY,
APPELLANT

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE

Notice of Appeal to The Supreme Court of the United States

Notice is hereby given that Globe Newspaper Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts of February 26, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Certificate of Service

I, James F. McHugh, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 33 of the Rules of the United States Supreme Court, by mailing a copy thereof, first-class postage prepaid, to Mitchell J. Sikora, Jr., 2019 McCormack Building, Boston, MA 02108, Assistant Attorney General for the Commonwealth of Massachusetts, attorney for appellee. All parties required to be served have been served.

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Date: May 2, 1980

Supreme Court, U. S.
FILED
JUL 17 1980
MICHAEL RODAK, JR., CLERK

No. 79-1862.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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No. 79-1862.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss.

In accordance with the provisions of Rule 16 of the Supreme Court of the United States, the Superior Court for the County of Norfolk, Massachusetts (the Superior Court or the Appellee) moves the court to dismiss the present appeal from a judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Statute Involved.

The Jurisdictional Statement accurately reproduces the statute involved at page 3.

Issues Presented.

1. Whether the controversy is moot.
2. Whether a state statute authorizing trial judges in their sound discretion to exclude the press and public from all or part of the criminal trial of a sexual offense against a minor victim, in order to preserve evidence required for a just conviction, violates the First Amendment right of the press to attend criminal trials.
3. Whether a state statute commanding trial judges to exclude the press and public from the criminal trial of a sexual offense during the testimony of a minor victim violates the First Amendment right of the press to attend criminal trials.

Statement of the Case.

An accurate statement of the case appears at pages 4-7 (statement of the Appellant Globe Newspaper Company [1]) and pages 25a-28a (opinion of the Massachusetts Supreme Judicial Court) of the Jurisdictional Statement.

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[1] The final three paragraphs of The Globe's "Statement of the Case", appearing at pages 7-8, are interpretation of the opinion of the Massachusetts Supreme Judicial Court.

Argument.

I. The Controversy is Moot. The Transient State of the Law During the Interim Between the Gannett and Richmond Decisions Renders the Present Case Incapable of Repetition.

The Appellant Globe Newspaper Company (the *Globe*) characterizes the present case as a dispute "capable of repetition, yet evading review" (1) because the challenged action (closure of an entire criminal trial to its reporters) was of too brief a duration to permit its litigation and (2) because it suffers the reasonable expectation of further similar treatment under the statute at issue (Jurisdictional Statement at 12-14). However several considerations converge against the conclusion that the present case will recur and that therefore it belongs within the traditional exception to mootness announced in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young*, 219 U.S. 498, 515 (1911), and applied in *Gannett Co., Inc.* v. *DePasquale*, 443 U.S. 368, 377 (1979).

First, the Supreme Judicial Court substantially constricted the operation of the statute in question. On its face Mass. G.L. c. 278, § 16A, appeared to bar the public and press from the entirety of the criminal trial of a sexual offense against a minor victim. However, by means of statutory interpretation strongly deferential toward possible First Amendment rights of the press and toward a traditional common law policy of open criminal trials, the court reasoned that the statute compelled closure of only that segment of a trial presenting the testimony of the minor victim and that it permitted closure of all or part of the remainder only upon a trial judge's comprehensive hearing (including participation by protesting members of the press and public), findings and rulings establishing the

necessity of the closure for the preservation of evidence for a just conviction. Opinion of the Supreme Judicial Court, Jurisdictional Statement at pages 32a-45a. Consequently the court viewed its treatment of the statute as a significant benefit to the press. "Although we do not squarely reach the constitutional questions raised today, we believe that the principles of construction we adopt bring us to a conclusion which approximates the results urged upon us by the Globe on constitutional grounds." Jurisdictional Statement at 34a.[2] Indeed the *Globe* now stands in a far better position as a result of the decision below, and no longer confronts the certain and recurrent prospect of complete exclusion from the whole of a trial of a sexual offense against a minor victim — the expectation which prompted the present lawsuit.

Second, the Supreme Judicial Court emphatically avoided consideration of the Federal constitutional issues pressed by the *Globe*. "Furthermore, instead of deciding the moot issues of the Globe's First and Sixth Amendment rights, we await the United States Supreme Court's decision in *Richmond Newspapers, Inc.* v. *Virginia, supra.*" Jurisdictional Statement at 33a. This caution arose from the volatility of the constitutional doctrine after the decision of *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), and during the pendency of *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 LW 5008 (July 2, 1980). See Jurisdictional Statement at 32a, final paragraph. The court's abstention from the constitutional questions carries several consequences for the vitality of the present appeal. An appeal under 28 U.S.C. § 1257(2) is premised upon a final adjudication of the Federal constitu-

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[2] In its accompanying footnote 5, the court observed that its opinion benefitted the newspaper as a matter of both substantive application of the statute and as a matter of procedural safeguards preceding closure. Jurisdictional Statement at 34a, n.5.

tional validity of a state statute.[3] No such final adjudication occurred in the present case. Because the Supreme Judicial Court was caught in the interim between *Gannett* and *Richmond Newspapers*, it could not reliably assess the constitutionality of G.L. c. 278, § 16A, and decided against the effort. The opinion of the court is rather an exercise of statutory construction in avoidance of constitutional questions during the pre-*Richmond* Federal law. The court never had the opportunity to judge § 16A in light of the First Amendment right of the press to attend criminal trials as declared in the *Richmond Newspapers* decision. And its choice to leave the constitutional questions in a condition of mootness evidenced a preference to decide such issues upon a post-*Richmond* record and doctrine. Neither the *Globe* nor the Superior Court can reasonably predict the Supreme Judicial Court's future application of *Richmond* to § 16A, either with regard to the mandatory closure of the testimony of a minor victim or with regard to a trial judge's discretionary closure of other parts of

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[3] In pertinent part, § 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"The first jurisdictional predicate of § 1257, in all its manifestations, is that there be a 'final' judgment or decree by the highest state court respecting the federal question." R.L. Stern & E. Gressman, *Supreme Court Practice*, 172-173 & n.12 (authorities collected) (5th ed. 1978).

such a trial for the necessary preservation of evidence.[4] Consequently the *Globe* cannot represent that it faces a recurrence of its experience in the present case. The controlling constitutional law and statutory application have now changed drastically since its exlusion from the entire underlying criminal trial in April and May of 1979.

Third, in the circumstances of changing doctrine, the Federal constitutional issues advanced by the *Globe* will come to the Supreme Court in a highly abstract or hypothetical form. A state trial court has not had a post-*Richmond* opportunity to create a record, especially findings weighing such state interests as the nature of the evidence and the possible harm to the juvenile against the constitutional entitlement of the public and press. Nor has an appellate court had a corresponding opportunity to pass upon the trial court's work product. In similar instances the Supreme Court has appropriately rejected an appeal because the Federal constitutional issues arrived before it without benefit of the state court's refinement and specification of the state law involved. *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 575 (1947). See also *Sanks* v. *Georgia*, 401 U.S. 144, 148-153 (1971); *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961). It should do the same here.[5]

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[4] Especially as to the discretionary exclusion of the press and public, each case will turn upon its own circumstances, particularly the quality of the trial judge's front-line findings in support of a closure ruling. As we discuss below, all Justices concurring in the judgment of the *Richmond Newspapers* decision acknowledged the existence of potential justifications for the closure of criminal trials in whole or part.

[5] One may add that the Supreme Judicial Court's acknowledgement of the appropriateness of review for moot cases "capable of repetition yet evading review" assures appellate consideration of an appropriate post-*Richmond* controversy upon its emergence from the Massachusetts trial courts. See Jurisdictional Statement at 26a, first full paragraph.

II. The Case Does Not Present a Substantial Federal Question.

The appellant asserts two Federal constitutional questions: (1) that the conferral of discretionary authority by § 16A upon trial judges to close all or parts of the trial of a sexual crime upon a minor in order to preserve evidence of a just conviction necessarily violates the press' First Amendment right of attendance (Jurisdictional Statement, 28-30); (2) and that the mandatory closure of the minor victim's testimony under § 16A also violates the press' First Amendment right of attendance (Jurisdictional Statement, 20-28).[6]

A. *A State Statute Authorizing a Trial Judge to Close All or Part of a Criminal Trial of a Sexual Offense Against a Minor, Upon a Comprehensive Hearing and Finding that Closure is Necessary to Preserve Evidence of a Just Conviction, Does Not Per Se Violate the First Amendment Right of the Press and Public to Attend Criminal Trials.*[7]

In the course of the *Richmond Newspapers* decision, 48 LW 5008 (July 2, 1980), all Justices acknowledging the First

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[6] The *Globe* adds similar theories under the Sixth Amendment (Jurisdictional Statement, 30-34). That line of argument appears far less relevant as a result of the First Amendment basis of the *Richmond Newspapers* decision. In response to the Sixth Amendment claims we point out (1) that a Sixth Amendment right of press attendance still has not received recognition; (2) and that, if such a right did gain acknowledgement, it would yield to state interests of the kind embodied in § 16A and explained more fully in the discussion below of the First Amendment claims.

[7] As to this issue in particular, the *Globe's* claim is moot. In the underlying criminal trial, it did not suffer from this application of the statute. The trial judge excluded the *Globe* be[illegible]e he regarded § 16A to be completely mandatory and to leave him no discretion in the matter (Jurisdictional Statement

Amendment right of the press to attend criminal trials recognized also that such a right was qualified and in appropriate circumstances might yield to countervailing justifications established by a trial judge in support of closure. See part D and footnote 18 of the plurality opinion of the Chief Justice, joined by Justices White and Stevens, 48 LW at 5015; part IV and footnotes 23 & 24 of opinion of Justice Brennan joined by Justice Marshall, 48 LW at 5019; concurring opinion of Justice Stewart, 48 LW at 5020 & n.5; concurring opinion of Justice Blackmun, 48 LW at 5021. The Justices cited such considerations as orderly proceedings, state secrets, the preservation of trade secrets, and the sensibilities of youthful prosecution witnesses as possible justifications for closure. And it emphasized the need for an informed and reasoned explanation of closure by the trial judge, in contrast with the summary exclusion of the press and public undertaken by the trial judge in the *Richmond Newspapers* instance.

As authoritatively construed by the Supreme Judicial Court, § 16A now imposes a procedure for an informed and reasoned closure decision on the part of a trial judge, and as substantive justification demands a showing of the "necessity" of closure for the preservation of evidence for a just conviction (Jurisdictional Statement at 43a-45a).

As a regimen of pre-closure procedure, the trial judge (1) must hold a hearing, (2) at which the party moving for closure must carry the burden of proof of its necessity, (3) at which the

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at 27a). The relaxed statutory construction of which the newspaper now complains arose only subsequently from the opinion of the Supreme Judicial Court (Jurisdictional Statement at 43a-45a). As to future application, the *Globe* cannot know or describe a constitutional injury until the circumstances of each case, especially the pre-closure findings of the trial judge, unfold. Thus it cannot reasonably predict repetitive constitutional harm of the kind alleged in this instance. In the text, we address its argument that even the relaxed interpretation is per se unconstitutional.

press and members of the public must have an opportunity to state objections, (4) and at the conclusion of which the trial judge must make findings of fact and appropriate rulings of law.

As the above cited comments of the Justices in *Richmond Newspapers* indicate, the need to preserve evidence of a just conviction is certainly a valid reason for closure. See also 6 J. Wigmore, *Evidence* § 1835 (Chadbourn Rev. 1976) cited in the plurality opinion, 48 LW 5015 n.18. Further, Mr. Justice Powell, who first espoused a press right of First Amendment attendance in *Gannett* v. *DePasquale*, but who did not participate in the *Richmond Newspapers* case stated on the earlier occasion, 443 U.S. 368, 398 (concurring opinion):

> [R]ight of access to courtrooms proceedings, of course, is not absolute. It is limited both by the constitutional right of defendants to a fair trial . . . *and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information* and the identity of informants. . . . The task of determining the application of these limitations in each individual trial necessarily falls almost exclusively upon the trial court asked to exclude members of the press and public from the courtroom [citations omitted; emphasis added].

Analogously, Justice Blackmun who in *Gannett* contended strenuously for a Sixth Amendment press right of attendance acknowledged that such a right in appropriate circumstances may respect certain exceptions. See 443 U.S. 368, 439-440 (opinion concurring in part and dissenting in part, joined by Justices Brennan, White and Marshall). Even commentators who have urged recognition of the First Amendment right announced in *Richmond Newspapers* have conceded the need for

evidence as a potentially overriding state interest. See, *e.g.*, Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv. L. Rev. 1899, 1914-1916, and 1918-1919 (1978).

> Before imposition of any secrecy devices will be allowed, a prosecutor will have to show not only that the particular witness cannot testify fully in public, but also that this difficulty represents a systematic problem so that refusing to allow closure will result in a pattern of repeated dismissals against the government. One possible example of such a systematic conflict is the need to secure testimony from the complainant in a rape case. If the prosecutor could show not only that the particular witness found it impossible to testify in public, but also that rape convictions generally would be highly difficult to obtain if the victim must testify in public, then a sufficient justification for overriding the first amendment right of public access would have been given (footnote omitted).

In the circumstances of the present case, then, the *Globe's* contention that under § 16A the very existence of a trial judge's sound discretion to close all or part of a trial in order to preserve necessary evidence constitutes a per se violation of a newspaper's First Amendment right of attendance fails to frame a serious or substantial Federal question. The *Globe* has yet to be subjected to such an exercise of discretion.[8] And when it does confront an adverse ruling, it may press its First Amendment claim according to the circumstances of a particular closure order and with the benefit of a full and specific record.

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[8] See n.7, *supra*.

B. *A State Statute Commanding a Trial Judge to Close the Testimony of a Minor Victim of a Sexual Offense to the Press and Public Does Not Violate the First Amendment Right of the Press and Public to Attend Criminal Trials.*

If, as the Justices explained in *Richmond Newspapers*, the First Amendment right of trial attendance will defer to certain overriding state interests, the privacy of minor or juvenile victims of sexual offenses such as rape qualifies as such a dominant interest. As the opinion of the Supreme Judicial Court elaborates, that interest as embodied in § 16A possesses at least two dimensions (Jurisdictional Statement at 37a, footnotes omitted): "the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public; and the Legislature joined this solicitude for victims with the broad, paternal protection afforded children generally." For the victim of sexual crime, especially of rape, the process of complaint, prosecution, and testimony is fraught with embarrassment, fear and trauma. For a victimized child, in particular, the experience may be frightening, stigmatizing, and psychologically damaging. These forces climax in the crucible of direct and cross examination at trial. In anticipation of that ordeal, § 16A enables a prosecutor to assure a young victim and her family that such a difficult experience will occur in a relatively private, it not protective, setting.

The fulfillment of one statutory purpose — the protection of the minor victim from the trauma of public testimony — leads to the achievement of a second statutory objective: the detection and prosecution of sexual offenses, such as rape and incest, upon children. As the Supreme Judicial Court observed (Jurisdictional Statement at 39a-40a), the prosecutor's assurance of some trial privacy will encourage communication and cooperation from victims and their families:

> Thus, the purpose of G.L. c. 278, § 16A, is to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial. . . .
>
> In broader terms, the statute's purposes go beyond protection of juvenile privacy to encompass the State's interest in sound and orderly administration of justice; most important, the statute helps obtain just convictions for the types of crimes from which the victims had often suffered at the hands of the criminal justice system, while their assailants had often gone free (citations omitted).

The closure of the child's testimony does not trammel unnecessarily upon the right of the press to attend and to report. The statute does not bar the press from requesting a transcript of the testimony; it does not bar it from independent interviews with and reports from courtroom observers including family and friends of the victim and accused who have a "direct interest" in the trial and who therefore are admitted to it under § 16A; it does not bar the press from the entire remainder of the trial unless the judge finds and explains overriding justification for further exclusion; and, of course, it does not bar the press from post-trial contact with any of the participants in the proceeding. In short, the press need only temporarily report around the testimony of the child victim.

In sum, the state interests in the privacy of children victim to sexual crimes and in the reporting and prosecution of those crimes are sensitive and substantial; the sacrifice of the press interest is limited and reasonable. The competition of those interests does not pose a significant Federal question.

Conclusion.

Therefore the appellee Superior Court respectfully submits that the questions decisive of the present case are either moot or so insubstantial as not to warrant further argument; and it moves the court to dismiss this appeal from the judgment entered below by the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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Supreme Court, U. S.
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No. 79-1862.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

GLOBE NEWSPAPER COMPANY,
Appellant,

v.

THE SUPERIOR COURT
FOR THE COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief in Opposition to Motion to Dismiss.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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No. 79-1862.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

GLOBE NEWSPAPER COMPANY,
Appellant,

v.

THE SUPERIOR COURT
FOR THE COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief in Opposition to Motion to Dismiss.

Pursuant to Rule 16.5 of the current rules of this Court, appellant, The Globe Newspaper Company, submits this brief in opposition to the Motion to Dismiss filed by appellee. Appellant does so for the purpose of addressing appellee's assertion that this case has been rendered moot by this Court's decision

in *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 U.S.L.W. 5008 (July 2, 1980) (No. 79-243).[1]

Three equally-unavailing arguments are presented by appellee in support of its contention that the present case is moot. First is the argument that the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts from which this appeal is taken "substantially constricted the operation of" Mass. G.L. c. 278, § 16A, the statute which the appeal concerns (Motion to Dismiss at 3). As a result, appellee argues, "the *Globe* now stands in a far better position as a result of the decision below, and no longer confronts the certain and recurrent prospect of complete exclusion from the whole of a trial of a sexual offense against a minor victim . . . ." (*Id.* at 4.)

True it is that the decision from which the present appeal is taken narrowed the sweep of § 16A. True it also is, however, that, even as narrowed, § 16A requires exclusion of the press and public from part of each and every trial to which the statute applies. Even as narrowed, the statute admits of no discretion on the part of the individual trial judges to allow anyone into the courtroom while critical testimony is being proffered. Even as narrowed, the statute permits no account to be taken, for example, of the victim's desire to testify in public, of the age and apparent maturity of the victim, of the type of "crime involving sex" with which the defendant is charged or of a host of other factors which might well make the partial closure mandated by § 16A inappropriate. Even as narrowed,

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[1] In addition to arguing that the case is moot, appellee argues that it presents no substantial federal question and that the appeal should be dismissed for that reason as well. That substantial federal questions are presented by this appeal was demonstrated in the Jurisdictional Statement. That substantial federal questions are present also is a conclusion which clearly emerges from a comparison of the issues presented by this case with those decided in *Richmond Newspapers*. As a consequence, no further time will be spent on that issue on this brief.

in sum, § 16A *permits* no inquiry of the type which this Court held in *Richmond Newspapers* was a necessary precondition to any valid order of closure in light of the command of the First Amendment to the Constitution. *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 U.S.L.W. 5008, 5015 (July 2, 1980) (No. 79-243).

The fact that the decision of the Supreme Judicial Court may have left appellant in a somewhat better position than it was at the commencement of this litigation, then, does not mean that the present appeal is moot. *Compare, e.g., County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (a case is moot if, *inter alia*, "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"); *SEC* v. *Sloan*, 436 U.S. 103, 109-10 (1978). To be sure, the Supreme Judicial Court's decision potentially reduces the magnitude of the asserted violation of appellant's rights which is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). That decision does not, however, reduce the certainty that appellant will be excluded in the future from at least a portion of a criminal trial by virtue of § 16A. In addition, the decision does not increase the likelihood that appellant's opportunity to litigate fully the propriety of any future exclusion will be more satisfactory than the insufficient opportunity it had in the present case. *Compare, e.g., Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 U.S.L.W. 5008, 5010 (July 2, 1980) (No. 79-243).

Appellee's second argument in support of its assertion that the present case is moot is somewhat difficult to follow. Essentially, however, that argument appears to consist of two parts. The first is that the Supreme Judicial Court "never had the opportunity to judge [the constitutionality of] § 16A in light of the First Amendment right of the press to attend crimi-

nal trials as declared in the *Richmond Newspapers* decision." (Motion to Dismiss at 5.) Second, the argument continues, because the Supreme Judicial Court did not have that opportunity, no one can reasonably predict what it will do when it does and thus no reasoned conclusion now can be reached concerning the results of the next constitutional challenge to the statute (*id.* at 5-6).

Three answers to appellee's argument immediately appear. First, although it is clear that the Supreme Judicial Court rendered its decision in the present case prior to this Court's decision in *Richmond Newspapers* and thus did not have an opportunity to consider the views expressed by this Court in *Richmond Newspapers*, the Supreme Judicial Court clearly had an opportunity to consider, and was requested to consider, the First Amendment contentions made by appellant. It expressly declined to do so (App. 33a). For present purposes, the Court's decision not to consider those contentions amounts to a judgment that no such rights existed. *See* Jurisdictional Statement at 9-10.

Second, when a change in the law has occurred during the process which brings a case to this Court, this Court's virtually uniform practice has been either to apply to that case the law in existence at the time the appeal is decided by this Court, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 102 (1974); *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711-15 (1974); *United States* v. *Schooner Peggy*, 1 Cranch (5 U.S.) 103, 110 (1801), or to reverse and remand the case to the tribunal from which it came for reconsideration in light of the new legal development. *E.g.*, *Harlin* v. *Missouri*, 439 U.S. 459 (1979); *Board of Trustees* v. *Sweeney*, 439 U.S. 24 (1978); *Oregon State Penitentiary* v. *Hammer*, 434 U.S. 945 (1977); *Thorpe* v. *Housing Authority*, 386 U.S. 670 (1967). Passing the question whether *Richmond Newspapers* announced "new" law, *compare*, *e.g.*, 48 U.S.L.W. at 5015 (Stevens, J., concurring)

with, e.g., Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975); *Healy* v. *James*, 408 U.S. 169 (1972), the fact that the Supreme Judicial Court did not have before it this Court's decision in *Richmond Newspapers* in February of 1980 supports at most a conclusion that reversal and remand is in order. It does not support a conclusion that the case is moot.

Third, and finally, the assertion that no one can predict what the Supreme Judicial Court for the Commonwealth will do when it next confronts the issue of the constitutionality of § 16A as narrowed, far from supporting appellee's assertion that the case is moot, supports appellant's assertion that it is not. This Court, for sound reasons, has held that an essential ingredient of mootness is an ability to say "with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). So formulated, what might be called the burden of prediction is cast on the party who seeks to have the proceeding dismissed as moot. It is cast on that party because any other allocation of the burden could well result in the invincibly repetitive violations of constitutional rights the mootness principles articulated in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911) were designed to avoid. *See generally, SEC* v. *Sloan*, 436 U.S. 103, 109-10 (1978). Consequently, appellee's assertion concerning an inability to predict what the Supreme Judicial Court will do the next time it is faced with a question concerning the constitutionality of § 16A as narrowed is, quite simply, an assertion that the present case is not moot.

As a final argument concerning mootness, appellee asserts that the issues tendered to this Court after the decision of the Supreme Judicial Court are abstract and hypothetical (Motion to Dismiss at 6). Not so. The Supreme Judicial Court's decision concerning the mandatory aspect of § 16A had the effect of affirming the trial court's order excluding appellant from a

specific portion of a specific criminal trial over the timely protest of both appellant and the defendant in the criminal case. The Supreme Judicial Court's decision also approved of that exclusion even though there had been no particularized "overriding interest articulated in findings" for excluding the press and public from that particular trial. *Compare, Richmond Newspapers, Inc.* v. *Commonwealth of Virginia*, 48 U.S.L.W. 5008, 5015 (July 2, 1980) (No. 79-243). It is difficult, therefore, to see how the issue appellant has raised concerning the mandatory portion of § 16A could be less hypothetical or less abstract.

Similarly, insofar as § 16A, as construed, invests the trial court with discretionary authority to close all or portions of certain criminal trials to the press and public when the victim is not testifying, the controversy presented to this Court is neither abstract nor hypothetical. To be sure, the standard for discretionary closure — whether closure is "necessary . . . to preserve evidence required for a just conviction," (App. 44a) — was not applied to appellant because appellant was summarily excluded from the entire trial under what appeared to be the statute's global force. Nevertheless, the question to be addressed now, in the wake of the Supreme Judicial Court's opinion and in the wake of this Court's opinion in *Richmond Newspapers*, is whether the standard for discretionary closure articulated by the Supreme Judicial Court constitutes the kind of "overriding interest" which this Court has said will alone provide a foundation for constitutionally-permissible closure. Appellant, of course, argues that it does not. More important for present purposes, however, is the fact that the "continuing and brooding presence" of that standard inevitably will affect the future ability of appellant to gain access to criminal trials. *Compare, Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122, 125-26 (1974). Beyond that, application of the standard to appellant may well produce irreparable injury, for

if the question concerning the propriety of the standard is not resolved now, appellant will be required to suffer exclusion from at least one more criminal trial before its rights can be vindicated. *See generally, Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. ____ , 48 U.S.L.W. 4162, 4165 (February 20, 1980) (No. 78-1335); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972). In sum, the controversy over the discretionary aspect of § 16A as construed by the Supreme Judicial Court is not moot.[2]

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[2]The cases cited by appellee in support of its third theory of mootness are all distinguishable. This Court dismissed the appeal in *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 575 (1947), because the procedural context for the state court's discussion of the statute at issue rendered that discussion so unclear and confusing that this Court was unable to determine how that statute had actually been construed. In the instant case, there is no similar ambiguity in the Supreme Judicial Court's explication of § 16A. In *Sanks* v. *Georgia*, 401 U.S. 144 (1971), the appeal was dismissed because the statute originally contested had been repealed and replaced by a new statute which eliminated the constitutional problem presented; in the case at hand, significant constitutional problems inherent in the statute remain. Finally, the Court's decision in *United States* v. *Fruehauf*, 365 U.S. 146 (1961), is also distinguishable in that, unlike the complicated factual and legal question presented there, this appeal presents a straightforward question of whether the statute as construed by the Supreme Judicial Court can survive constitutional scrutiny.

Conclusion.

For the foregoing reasons, and for the reasons discussed in the Jurisdictional Statement, appellant respectfully requests that the Motion to Dismiss be denied and that probable jurisdiction be noted.

Respectfully submitted,

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